from prosecutor Hansen. *Id.* at 74-75; Record, Tr. July 10, 2002, pp. 380, 398-99, 2314-15.

After finding the key government testimony to be completely false, the trial judge overturned most of the counts of conviction, including the foundational counts 1 and 2, and the government did not retry them. The trial judge did not overturn the foregoing Counts 12 (mail fraud) and 14 (false claims), however, even though these counts expressly incorporated and relied upon count 2, which in turn incorporated count 1. App., *infra*, 48a, 50a; *see also id.* at 28a. Counts 12 and 14 required proof of criminal intent, for which the prosecution relied heavily on Ms. Statler's false testimony.

Counts 12 and 14 addressed services performed by an assistant (Walter Woods) aiding in the therapy of mental patients. The jury convicted defendants on these counts amid the broader, false testimony of fraud presented by Ms. Statler and allegations of improperly billing for an assistant (sometimes allowed as "incident to" or "substitute" billing). The district court held that Ms. Statler was a material witness on some substitute billing charges: "I also find that Ms. Statler was a material witness on the charges related to substituted billing . . . ." *Id.* at 58a. But the district court denied a request to overturn the convictions on counts 12 and 14.

On February 9, 2004, the appellate decision below affirmed the convictions only by overturning the 75-year-old standard of *Larrison v. United States*, 24 F.2d 82 (7th Cir. 1928), and creating a newly permissive rule for perjury:

> Today, we overrule *Larrison* and adopt the reasonable probability test. In order to win a new trial based on a claim that a government witness committed perjury, assuming as in this case that the government did not knowingly present the false testimony, defendants will have to prove the same things they are required to prove when moving for a new trial for other reasons. Defendants will have to show that the existence of the

> perjured testimony (1) came to their knowledge only after trial; (2) could not have been discovered sooner with due diligence; (3) was material; and (4) **would probably have led to an acquittal** had it not been heard by the jury.

App. at 22a (emphasis added). The court then applied this test broadly even to where the perjury was by a government employee and member of the prosecutorial team, as Ms. Statler was.[1]

Defendants raised its arguments below concerning perjury and, in a supplemental brief, requested relief under *Blakely v. Washington*, 542 U.S. 296 (2004). This Court granted defendants' petition without reaching the perjury issues, vacated the judgment below and "remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *United States v. Booker*." 125 S. Ct. 984 (2005). The Seventh Circuit subsequently remanded to the trial judge for an opinion on "whether the additional discretion afforded by *Booker* would affect the defendants' sentences." App. 11a.

Without even holding a hearing, the trial judge on remand declared that she would have sentenced defendants to the exact same 23 and 15 months in jail, based on the proven amount of only $75.25, by using the Sentencing Guidelines as advisory rather than mandatory. App. 2a-9a. On appeal of the resentencing, the Seventh Circuit affirmed. *Id.* at 1a. Defendants timely reassert their arguments for overturning

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[1] In affirming the convictions, the federal court below treated a mere physicians' handbook as having the power of law, despite Illinois case law denying its enforcement for failure to be promulgated pursuant to the Administrative Procedure Act. *See Sheen v. Illinois Dep't of Public Aid*, Case No. 86-MR-30 (Ill. 10th Cir. Dec. 4, 1987) (reprinted at C.A. App. 29).

the convictions based on perjury in this petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

"The dignity of the United States Government will not permit the conviction of any person on tainted testimony. This conviction is tainted, and there can be no other just result than to accord petitioners a new trial." *Mesarosh v. United States*, 352 U.S. 1, 9 (1956). But here the prosecution relied heavily on perjury by a government employee who was directed by the prosecutor. The court below recognized the impact of the perjury in dismissing, post-trial, most of the counts of conviction. App. 2a-9a. "[A]ll perjured relevant testimony is at war with justice." *In re Michael*, 326 U.S. 224, 227 (1945).

For 75 years the Seventh Circuit adhered to a rigorous deterrent to the government's use of perjury in criminal trials, a standard that still governs in the Fourth and Sixth Circuits and, under various circumstances, in other Circuits also. Under this traditional test as restated by the court below, defendants convicted through the use of perjury are entitled to a new trial if the "jury *might* have reached a different verdict" in the absence of the perjury. App. at 21a (emphasis in original). This venerable approach deterred governmental use of perjury, protected the right to a jury trial by defendants, and safeguarded the integrity of judicial process.

The decision below instead adopted a new test that is permissive of prosecutorial perjury, and which enabled affirmance of the convictions at bar. Lacking real proof of criminal intent in defendants' disorganized medical office, the prosecution had resorted to false testimony to convict. On appeal, defendants' convictions on a small billing dispute could only be affirmed by diluting the standard for perjury, in contravention of 75 years of precedents in the Seventh Circuit, current law in at least four other Circuits, and Supreme

Court holdings. The court below adopted a newly permissive test that denies a new trial whenever defendants failed to prove that the perjury "would *probably* have led to an acquittal had it not been heard by the jury." *Id.* at 22a (overturning *Larrison v. United States*, 24 F.2d 82 (7th Cir. 1928), emphasis in original). Defendants were then not even given an opportunity to meet that new test in this case.

This Court has never shifted the burden to a defendant seeking a new trial to prove that he would *probably* have obtained an acquittal in the absence of perjured governmental testimony. Such shifting is clearly inappropriate where, as here, the perjury was by a member of the prosecutorial team. *See, e.g., Napue v. Illinois*, 360 U.S. 264, 272 (1959) ("[T]he false testimony used by the State in securing the conviction of petitioner may have had an effect on the outcome of the trial. Accordingly, the judgment below must be *Reversed*."). Moreover, it is inconsistent with this Court's ruling in *Booker* for a court to speculate on whether a jury would have found guilt. *United States v. Booker*, 125 S. Ct. 738, 748 (2005).

The implications of the new standard pronounced below are catastrophic for the integrity of the criminal justice system, at the expense of the right to trial by jury. As shown below, a writ of certiorari is necessary here to resolve the conflict between the decision below and the other Circuits and this Court.

I. THE CIRCUITS ARE EXPRESSLY DIVIDED OVER THE STANDARD FOR A NEW TRIAL BASED ON PERJURY BY A GOVERNMENT WITNESS.

The Seventh Circuit expressly disagreed with the Fourth and Sixth Circuits, and implicitly disagreed with other Circuits, in adopting and applying a permissive rule for government use of perjury. This issue has fully percolated among all the Circuits and is best presented here for

resolution by this Court: the perjury is clear and undisputed, having already necessitated dismissal of nearly all counts of conviction against defendants. By adopting a more permissive standard for perjury the court below affirmed the remaining counts of conviction, amounting to only $75.25 in alleged fraud.

The Seventh Circuit conflicted with other Circuits and contravened precedents of this Court. Most recently in *Banks v. Dretke*, this Court has emphasized its intolerance of deception by the prosecution, reiterating that defendants need not prove that they would have been otherwise acquitted in order to obtain relief. *See Banks*, *quoted infra* Part I.B. Perjury undermines the integrity of legal process, and this Court has consistently favored new trials to reduce the scourge of conviction-by-lies. The Seventh Circuit ruling to the contrary must be reversed.

A. The Decision Below Squarely Presents the Conflict by Expressly Disagreeing with the Fourth and Sixth Circuits, and also Conflicting with Many Other Circuits in the Scope of the Permissive Standard.

The Seventh Circuit decision expressly conflicts with the Fourth and Sixth Circuits concerning convictions based on perjury, thereby compelling resolution by this Court. The Seventh Circuit decision also implicitly conflicts with the First and Ninth Circuits, and departs from the Second and D.C. Circuits in application of its permissive rule. The Seventh Circuit changed the standard for a new trial for perjury from whether the "jury *might* have reached a different verdict" to a requirement that defendant prove that the perjury "would *probably* have led to an acquittal had it not been heard by the jury." App. at 21a, 22a (emphasis in original). The Seventh Circuit also implicitly expanded the scope of its permissive test to all situations except where the prosecutor

demonstrably knew about the perjury beforehand, thereby allowing perjury where, as here, the prosecutor at least negligently permitted it. *See id.* at 22a.

The decision below declares its conflict with the Fourth Circuit, which adhered to the traditional *Larrison* test in *United States v. Lofton*, 233 F.3d 313 (4th Cir. 2000). The Fourth Circuit follows the same standard for veracity that was originally in place during defendants' trial here. Specifically, a new trial must be granted if false, material and surprising testimony was used to convict and the jury *might* have reached a different conclusion. *See id.* at 318. Only by rejecting this traditional test *ex post facto* was the Seventh Circuit able to affirm defendants' convictions.

Defendants' right to a new trial depended on the happenstance of venue. Had they been convicted in the Fourth rather than Seventh Circuit, then they would have obtained a new trial under the traditional test. The Fourth Circuit *Lofton* decision cited longstanding precedent in its jurisdiction that its courts do not tolerate perjury, and defendants ambushed by it need not prove innocence to obtain a new trial. *See, e.g.*, *United States v. Wallace*, 528 F.2d 863, 866 (4th Cir. 1976) (rejecting any relaxation of the traditional *Larrison* rule). Yet the court below allowed perjury that the Fourth Circuit would not.

The Seventh Circuit also conceded its conflict with the Sixth Circuit which, like the Fourth Circuit, adheres to *Larrison*. *Gordon v. United States*, 178 F.2d 896, 900 (6th Cir. 1949), *cert. denied*, 339 U.S. 935 (1950) (stating that the test requires a new trial if "the jury might have reached a different conclusion"). Where, as here, the government witness recants her testimony after trial, the Sixth Circuit has recently reiterated the need to apply the *Larrison* "might have" test. *See United States v. Willis*, 257 F.3d 636 (6th Cir. 2001).

In *Willis*, the Sixth Circuit affirmed a district court's grant of a new trial and emphasized that the *Larrison* standard must apply to "situations in which a material witness for the government recants his testimony after the trial." *Id.* at 644. That Circuit maintained that "in more recent cases, we have recognized the [*Larrison* and *Gordon*] test's continuing applicability in criminal cases, and we have applied the test to new trial motions in the civil context." *Id.* (citing *Gordon*, *supra*). In direct conflict with the Sixth Circuit, the court below completely rejected the *Larrison* test even where the key prosecution witness, Ms. Deanna Statler, was found by the trial judge to have testified falsely. App. at 55a-56a. The Seventh Circuit also departed from the Eighth Circuit. *See United States v. Peterson*, 223 F.3d 756, 763 (8th Cir. 2000), *cert. denied*, 531 U.S. 1175 (2001) (inquiring whether "a reasonable likelihood exists that the perjured testimony could have affected the jury's judgment").

The decision below further conflicts with other Circuits in its application. The perjury here was presented by a member of the prosecution team and the prosecutor plainly should have known that the testimony was false. Yet the court below declared that if "the government did not knowingly present the false testimony," then it would not be held to the traditional *Larrison* rule. App. at 22a. The court thereby shifted to defendants the unjustified burden of proving actual knowledge rather than recklessness or negligence by the prosecutor in utilizing perjury. The courts below even denied defendants' motions for an opportunity to satisfy this new test. This permissiveness towards perjury amid prosecutorial negligence conflicts directly with the Ninth Circuit, which adheres to the *Larrison* test where the prosecution negligently allowed the introduction of perjured testimony. *See United States v. Krasny*, 607 F.2d 840, 844-45 (9th Cir. 1979), *cert. denied*, 445 U.S. 942 (1980); *United States v. Chisum*, 436 F.2d 645 (9th Cir. 1971).

In the case at bar, the perjury was by a prominent member of the prosecution team. Ms. Statler testified falsely about data she discussed with the prosecutor AUSA Patrick Hansen. He told her what he wanted from the data and he supplied her with a sample spreadsheet. C.A. App. 15. Using his spreadsheet, she entered one or two of the files and then showed it to prosecutor Hansen to ask if that was what he was looking for. *Id.* at 15-16. Ms. Statler met with the prosecution team in order to prepare the false trial exhibit (20B), *id.* at 20-21, and then commit perjury. This was perjury by a member of the prosecutorial team, triggering the traditional *Larrison* test even in Circuits that have departed from it in other contexts.

The prosecutor AUSA Patrick Hansen personally prepared the false trial exhibit 20B that graphically and falsely illustrated defendants to have engaged in fraud. App., *infra*, at 63a; C.A. App. 95 (quoted in *Statement of the Case*, *supra*). Ms. Statler confirmed that prosecutor Hansen "had done the chart on his computer." *Id.* at 114. It was the data presented in Exhibit 20B, including the assertion of 1,178 undocumented claims, that the trial judge later found to be dramatically false. App., *infra*, 55a-57a.

Ms. Statler's post-trial testimony indicated that she played an active and integral role as member of the prosecution team and that she discussed her testimony with AUSA Hansen. C.A. App. 15 ("I discussed the spreadsheet with Mr. Hansen. And also discussed it with other members of—other investigators."). Ms. Statler further testified that she was on loan to the prosecution team itself and took directions directly from prosecutor Hansen. *Id.* at 74-75; Record, Tr. July 10, 2002, pp. 380, 398-99, 2314-15.

As a member of the prosecution team who took instructions from the prosecutor, Ms. Statler's knowledge is plainly imputed to the prosecution. Her perjury was the prosecution's perjury, and it destroys integrity to allow the perjury-

based convictions to be sustained. *See United States v. Williams*, 233 F.3d 592, 594 (D.C. Cir. 2000) ("The phrases—'reasonable likelihood' 'could have affected'—'mandate a virtual automatic reversal of a criminal conviction.'"); *United States v. Stofsky*, 527 F.2d 237, 243 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976) (prosecutorial knowledge of perjury requires "a virtual automatic reversal of a criminal conviction").

This colorable claim that the government knowingly used perjury to convict defendants would have also prompted a new trial in the First Circuit. The First Circuit held that a colorable claim of government knowledge requires it to "ask whether there is any reasonable likelihood or probability that the proffered evidence that [a witness's] testimony was false could have affected the jury's judgment." *United States v. Gonzalez-Gonzalez*, 258 F.3d 16, 22 (1st Cir. 2001). The decision below directly conflicts with that "could have" test.

The overturning of the 75-year-old *Larrison* test provides this Court with its best opportunity to resolve the conflict among the Circuits and clarify the standard for perjury. The court below weakened the safeguards against use of perjury in prosecutions. Full review here is necessary to restore consistency and integrity in criminal justice, and to deter prosecutorial use of perjury.

B. The Seventh Circuit Test Conflicts with Rulings of This Court.

The decisions below conflict with this Court's rejection of prosecutorial deception in an analogous situation. *Banks v. Dretke*, 124 S. Ct. 1256 (2004). There the defendants suffered from the concealment of exculpatory *Brady* material and perjured testimony by government witnesses, and sought relief on that basis. The Court reiterated its holding in *Kyles v. Whitley* that "the materiality standard for *Brady* claims is met when 'the favorable evidence could reasonably be taken

to put the whole case in such a different light as to undermine confidence in the verdict.'" *Id.* at 1276 (quoting *Kyles*, 514 U.S. 419, 435 (1995)). "'A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict.'" 124 S. Ct. at 1276 (quoting *Kyles*, 514 U.S. at 434-435).

The decisions below directly conflict with this Court's precedents. Ms. Statler's truthful testimony would have been that an audit of defendants' records did not indicate any scheme to defraud. Instead, she presented false inculpatory evidence in order to prove a scheme to defraud and fraudulent intent. Her testimony plainly cast the whole case in "a different light" and under *Banks* and *Kyles* the burden of proof does not shift to defendants to "demonstrate" that otherwise "there would not have been enough left to convict." *Id.* Yet that is precisely what the court below required in permitting prosecutorial perjury unless defendants can prove that the jury would have acquitted them.

When other transgressions occur at trial, this Court does not shift the burden to defendants to prove innocence. *See, e.g., Fahy v. Connecticut*, 375 U.S. 85 (1963). The constitutional standard for erroneous admission of evidence, for example, does not require defendants to show they probably would have been acquitted in its absence. "We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of **might have** contributed to the conviction." *Id.* at 86-87 (emphasis added). The test promulgated by the court below to allow perjury conflicts with this Court's high solicitude for integrity in prosecutions.

Similarly, the decision below conflicts with this Court's holding in *Mesarosh v. United States*, 352 U.S. 1 (1956).

There this Court considered convictions for conspiracy under the Smith Act. A key government witness had apparently testified untruthfully in a similar way in analogous proceedings. This Court declared that the witness' "credibility (had) been wholly discredited." *Id.* at 9. This Court concluded that it would be "unreasonable" to find that "the witness . . . testified truthfully in this case in 1953 as an undercover informer concerning the activities of the Communist conspiracy, yet concurrently appeared in the same role in another tribunal and testified falsely . . . about a plan by different members of the Communist conspiracy to assassinate a United States Senator." *Id.* at 13 (footnote omitted).

A majority of this Court in *Mesarosh* thought a new trial was required due to this perjury, even though it did not even occur in the same proceeding. This Court has reiterated its intolerance of perjury in similar cases. "If these witnesses in fact committed perjury in testifying in other cases on subject matter substantially like that of their testimony in the present proceedings, their testimony in this proceeding is inevitably discredited . . . ." *Communist Party of the United States v. Subversive Activities Control Bd.*, 351 U.S. 115 (1956). Where, as here, the credibility of a key government witness has been "wholly discredited," a new trial is warranted. The court below contravened this Court's precedents in holding otherwise.

This Court "has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony *could* have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976) (emphasis added, citations omitted). That knowledge is imputed to prosecutors where, as here, the falsity of the testimony is known by a member of the prosecution team. "[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on

the government's behalf in the case, including the police." *Kyles*, 514 U.S. at 437.

The Seventh Circuit below violated these principles in limiting a new trial to where the prosecutor was shown to have actually known about the perjury. App., *infra*, 21a ("absent a finding that the government knowingly sponsored the false testimony"). This Court has rejected a test of actual knowledge in the analogous context of favorable evidence. "But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995). Where, as here, the deception is by a member of the prosecutorial team, it is "inescapable" that a new trial is warranted. *See Giglio v. United States*, 405 U.S. 150, 153-54 (1972) ("[D]eliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice'" and "whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor.") (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)).

This Court has never required defendants victimized by perjury to prove that they would have been otherwise acquitted in order to win a new trial, and the decision below is at odds with this Court's precedents.

C. There is Heightened Urgency to Deter Perjury in Criminal Trials in Light of the Increasingly Permissive and Conflicting Standards.

High profile examples of perjury in federal court abound. "In a dramatic twist in the Martha Stewart case, federal prosecutors last week charged a government witness with lying on the stand. . . . Now here's a thought: Maybe one of these days we'll discover the truth." Lisa Stein, "The Big

Lie(s)," *U.S. News & World Report* 18 (May 31, 2004). In contrast, state courts are more vigilant at addressing and deterring the use of perjury in prosecutions. *See, e.g., Yates v. State*, 171 S.W.3d 215 (Ct. App. Tex., 1st Dist. 2005), *appeal denied*, 2005 Tex. Crim. App. LEXIS 1926 (Tex. Crim. App., Nov. 9, 2005) (overturning a denial of mistrial in the Andrea Yates case because "there is a reasonable likelihood that Dr. Dietz's false testimony could have affected the judgment of the jury").

Federal appellate courts are besieged with convictions procured by perjury, yet have only conflicting standards to apply. The First Circuit has encountered perjury by prosecution in at least three different cases in the past six years. *See United States v. Gonzales-Gonzales*, 258 F.3d 16 (1st Cir. 2001); *United States v. Josleyn*, 206 F.3d 144 (1st Cir. 2000); *United States v. Huddleston*, 194 F.3d 214 (1st Cir. 1999). Its relative tolerance of prosecutorial perjury may have increased the occurrence there.

Amid the uncertainty in the proper standard, perjury runs amok. The Fourth Circuit has faced an epidemic of perjury in prosecutions challenged on appeal, including at least five appellate cases in the last six years on this issue. *See United States v. Maynard*, 77 Fed. Appx. 183 (4th Cir. 2003); *United States v. King*, 71 Fed. Appx. 192 (4th Cir. 2003); *United States v. Gullett*, 62 Fed. Appx. 554 (4th Cir.), *cert. denied*, 124 S. Ct. 498 (2003); *United States v. Roberts*, 262 F.3d 286 (4th Cir. 2001), *cert. denied*, 535 U.S. 991 (2002); *United States v. McGrady*, 1999 U.S. App. LEXIS 2395 (4th Cir.), *cert. denied*, 528 U.S. 855 (1999). In *King*, the perjury was so overwhelming that "in thirty years of practice and ten on the bench, [the trial judge] had never had 'less confidence' in a verdict." 71 Fed. Appx. at 194. The Fourth Circuit's response has been adherence to the traditionally rigorous test rejected by the court below.

Had defendants been convicted in most other Circuits—or even in their own Seventh Circuit earlier—then they might have obtained a new trial. Defendants' incarceration and deprivation of a new trial is purely a product of happenstance of venue. This lottery effect of the conflict in the Circuits is confounding judges, corroding historic deterrence of perjury, undermining the integrity of prosecutions, and eroding public confidence in justice. *See* Brian Murray and Joseph C. Rosa, "He Lies, You Die: Criminal Trials, Truth, Perjury, and Fairness," 27 *N.E. J. on Crim. & Civ. Con.* 1 (Winter 2001).

The permissive approach towards perjury allows it to grow like a cancer amid the confusion about the proper standard. The Fifth Circuit struggled with the uncertainty to conclude only that it "arguably" adheres to the same probability standard for evidence of perjury as with other newly-discovered post-trial evidence. *United States v. Nixon*, 881 F.2d 1305, 1311 (5th Cir. 1989). Sixteen years later, the standard is even murkier. In the absence of a clear rule as a bulwark against the use of perjury by prosecutors, false testimony will only increase.

The medley of standards governing prosecutorial perjury stands in stark contrast to the exclusionary rule, which flatly prohibits the use at trial of much evidence improperly seized. *See Weeks v. United States*, 232 U.S. 383, 392 (1914). The deterrence effect of the exclusionary rule is woefully lacking with respect to perjury in prosecutions. The decision below allows prosecutors to close their eyes to blatant perjury by key government witnesses. But reward should not greet negligent conduct. The Seventh Circuit is in error in condoning such negligence here and its possible effect on the outcome, in contrast to the other Circuits and holdings of this Court. *See, e.g., Napue v. Illinois*, 360 U.S. 264, 272 (1959) (reversing a conviction obtained by perjury because it "may have had an effect on the outcome of the trial").

Integrity in prosecutions has eroded amid the uncertainty about the standard governing post-trial discovery of perjury. The traditional *Larrison* rule served the judiciary and public well in protecting defendants' right to a jury trial and deterring perjury, but the newly permissive standard adopted below eliminates that safeguard. There is heightened importance to reestablishing a clear and effective deterrent to the use of perjury by the prosecution.

II. THE COURT BELOW DEPRIVED DEFENDANTS OF THEIR RIGHT TO TRIAL BY JURY, AS CLARIFIED BY *UNITED STATES V. BOOKER*, BY AFFIRMING CONVICTIONS DESPITE DISMISSAL OF UNDERLYING CHARGES.

The trial judge substituted her factual findings for that of the jury by dismissing charges, for taint of perjury, while sustaining other charges which expressly relied on the dismissed charges. The jury returned convictions, *inter alia*, on Counts 1, 2, 12 and 14. But Counts 12 and 14 expressly relied upon and incorporated Count 2, which in turn expressly relied upon and incorporated Count 1. App., *infra*, at 48a, 50a. It is impossible for the judge to determine how much the jury relied on its findings of guilt for Counts 1 (for both defendants) and 2 (for defendant Mitrione) in assessing wrongdoing for Counts dependent on 1 and 2, and her factfinding deprived defendants of their right to trial by jury within the meaning of *United States v. Booker*, 125 S. Ct. 738 (2005).

The appellate court below expressly found that the convicted counts incorporated the vacated counts:

> Here, the defendants were convicted of one count of mail fraud and one count of filing false claims. **These counts adopted parts of counts 1 and 2**, which charged the defendants with devising a scheme to defraud the

> Medicaid and Medicare programs of the State of Illinois and the United States.

App., *infra*, 28a (emphasis added). The appellate court even relied on this incorporation in affirming a longer sentence for defendants. *Id.* at 28a-29a. Counts 12 and 14 cannot stand alone, and expressly depended on the schemes alleged and ultimately dismissed in Counts 1 and 2. The trial judge found defendants guilty when the issue is within the sole province of the jury under *Booker*.

A. The Decision Below Deprived Defendants of Their Right to Trial by Jury by Substituting the Court's Factfinding for the Jury's.

"The Constitution gives a criminal defendant the right to demand that a jury find him guilty of **all the elements** of the crime with which he is charged." *United States v. Gaudin*, 515 U.S. 506, 511 (1995) (emphasis added). Defendants properly obtained dismissal of Counts 1 and 2, which were essential to establishing *mens rea* for Counts 12 and 14, yet the trial judge refused to vacate the convictions on Counts 12 and 14. She usurped the role of the jury by denying a new trial, and denied defendants their right to an impartial determination by the jury of their alleged criminal intent. U.S. CONST., AMEND. VI. This Court held in *Agurs* that a conviction must be overturned because of the government's knowing use of perjured testimony if there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." 427 U.S. at 103. *See also Chambers v. Mississippi*, 410 U.S. 284 (1973) (defendant is denied a fair trial when certain hearsay is excluded or a state's rule against impeaching a witness prevents defendant's use of a prior confession).

Count 12, for mail fraud, requires a jury finding of specific intent to defraud, beyond reasonable doubt; Count 14, for false claims, requires similar scienter. The Statler testimony

was the primary evidence of *mens rea*, and was found by the court, post-trial, to be utterly false. Defendants have a right to a trial by an impartial jury, free from taint of perjury, on these counts. The remaining evidence on the mere $75.25 is more consistent with mistake than fraud, and thus cannot establish guilt as a matter of law beyond a reasonable doubt. The trial judge cannot make her own factfinding concerning guilt without depriving defendants of their Sixth Amendment right to a jury trial. *See United States v. Booker,* 125 S. Ct. 738, 748 (2005).

It is well-established that a conviction must be reversed when it is based on alternative legal theories, one of which is legally erroneous, and it is not possible to know the basis of the jury's decision. *See, e.g., United States v. Sawyer*, 85 F.3d 713, 730-31 (1st Cir. 1996) ("When a jury has been presented with several bases for conviction, one of which is legally erroneous, and it is impossible to tell which ground the jury convicted upon, the conviction cannot stand."); *cf. Peters v. Kiff*, 407 U.S. 493, 504 (1972) (reversing a conviction where "there is no way to determine what jury would have been selected under a constitutionally valid selection system, or how that jury would have decided the case"). This unconstitutional infirmity is presented here: the only remaining counts expressly incorporate and are intertwined with counts 1 and 2, upon which the jury convicted defendants due to false testimony. The trial judge found that counts 1 and 2 cannot be sustained. Nor can other counts utilizing them be sustained either. *See Williams v. United States*, 500 F.2d 105, 108 (9th Cir. 1974) (reversing a perjury-based conviction because "[a] conviction based substantially upon tainted evidence cannot stand").

B. This Court Should Resolve the Ambiguity and Conflict Concerning Application of *Booker* to Tainted Verdicts.

The decision below conflicts with another decision in the Sixth Circuit applying *Booker* to analogous facts. *See United States v. Rohira*, 355 F. Supp. 2d 894 (N.D. Oh. 2005). There, as here, the defendant was convicted of health care billing fraud based on unjustified estimates by a government witness. There, as here, the defendant moved for a new trial on this basis.

In *Rohira*, the trial court granted defendant a new trial through application of *Booker*:

> The prosecution called FBI Special Agent Graupmann to testify about the amount of financial loss caused by the defendant's alleged billing fraud; through a dubious method discussed below, he estimated the loss at over $ 1 million. Under *Booker* and *Blakely*, that is a fact that must be admitted by the defendant or expressly found by the jury beyond a reasonable doubt before it may be used to help convict him or to increase his sentence.

Rohira, 355 F. Supp. 2d at 900 (citing *Blakely v. Washington*, 542 U.S. 296 (2004), footnote deleted). This ruling follows directly from *Booker*, yet the decision below conflicts with both *Booker* and *Rohira* in denying a new trial.

In addition, the decision below conflicts with the interpretation of *Booker* as a structural requirement that cannot be overlooked as "harmless error." *See Washington v. Recuenco*, 110 P.3d 188, *cert. granted*, 126 S. Ct. 478 (2005) ("*Blakely* Sixth Amendment violations . . . can never be deemed harmless because to do so would be to speculate on the absence of jury findings") (citing *Washington v. Hughes*, 154 Wn.2d 118 (2005)). Even if this Court reverses *Recuenco* and adopts a "harmless error" test for jury findings, the burden of proof should never shift to the defendant to

prove that he would have been acquitted in the absence of the error. Yet under the erroneous reasoning below, a judge may uphold a jury finding as long as the defendant fails to prove that, in the absence of the error, he would have been acquitted.

The *Larrison* standard for reviewing perjury is consistent with *Booker*, and a "harmless error" application of *Booker*. In overturning *Larrison*, the decision below impermissibly allows judges to substitute their findings for that of the jury when perjury taints the verdict.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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November 22, 2005

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 02-4222 & 02-4224

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT T. MITRIONE and MARLA A. DEVORE,
Defendants-Appellants.

August 26, 2005, Decided

Before Hon. ILANA DIAMOND ROVNER, *Circuit Judge*, Hon. TERENCE T. EVANS, *Circuit Judge*, Hon. ANN CLAIRE WILLIAMS, *Circuit Judge.*

ORDER

After our limited remand under United States v. Paladino, 401 F.3d 471, 483-84 (7th Cir. 2005), the district judge concluded, unequivocally, that knowledge about the advisory status of the sentencing guidelines would not have affected her decision. She would have imposed the same sentence as originally imposed on both Robert Mitrione and Maria DeVore. Those sentences, we conclude, could not be viewed as unreasonable. Accordingly, the defendants' objections to their sentences are rejected, and the judgments under appeal are AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

No. 00-30021

UNITED STATES OF AMERICA,
Plaintiff,

v.

ROBERT T. MITRIONE and MARLA DEVORE,
Defendants.

OPINION

JEANNE E. SCOTT, U.S. *District Judge*:

This matter is before the Court on limited remand from the United States Court of Appeals for the Seventh Circuit. The Court is directed to consider Defendants Robert T. Mitrione and Marla DeVore's sentences pursuant to *United States v. Paladino* and to inform the Court of Appeals "whether the additional discretion afforded by *Booker* would affect the defendants' sentences." *USCA Order*, May 19, 2005 (d/e 314); *see also United States v. Booker*, 125 S.Ct. 738 (2005); *Paladino*, 401 F.3d 471 (7th Cir. 2005). All parties have submitted position statements. *Defendant, Robert T. Mitrione's Suggestions on Remand (d/e 315); Position on Previously Imposed Sentence (d/e 316); DeVore's Statement of Position for Re-Sentencing (d/e 317)*. For the reasons set forth below, the Court finds that it would have imposed the same sentences under a system in which the United States Sentencing Guidelines (U.S.S.G.) were advisory, rather than mandatory.[1]

[1] The Court determines that a hearing on this issue is unnecessary. *See Paladino*, 401 F.3d at 484.

On September 13, 2001, a jury found Mitrione guilty of Counts 1-6, 9-12, 14 and 15 of the Indictment and DeVore guilty of Counts 1, 3-5, 9-12, 14 and 15. Count 13 was voluntarily dismissed by the Government. Mitrione was acquitted on Counts 7 and 8, and DeVore was acquitted on Counts 2 and 6-8. On August 23, 2002, upon Defendants' Motion for a New Trial, this Court vacated the conviction on Counts 1-6, 9-11 and 15 as to Mitrione and Counts 1, 3-5, 9-11, and 15 as to DeVore. The counts were vacated on the grounds that the jury might have been influenced by the false testimony of a witness for the Government. The Government elected not to retry the vacated counts. The Motion for a New Trial was denied as to each Defendant for Counts 12 and 14. The matter then proceeded to sentencing on these counts.

Count 12 alleged Mail Fraud, in violation of 28 U.S.C. § 1341, and Count 14 alleged False Claims for Medical Services, in violation of 18 U.S.C. § 287. In preparation for sentencing, the United States Probation Office prepared a second revised Presentence Report (PSR) dated October 7, 2002, for each Defendant. At the sentencing hearing on October 31, 2002, the Court, using the November 2001 version of the U.S.S.G., determined that Defendant Mitrione had a base offense level of 6. *U.S.S.G*, § 2B 1.1(a). His offense level was increased by four levels, over objection, based on the Court's finding of an amount of loss of $11,255.65. *U.S.S.G.* § 2B1.1(b)(1)(C). Again over defense objection, the Court imposed a two-level enhancement in offense level based on a finding of vulnerable victims pursuant to U.S.S.G. § 3A1.1(b)(1). The Court increased Mitrione's offense level by two levels under U.S.S.G. § 3B1.3 over objection after finding that he abused a position of trust. Finally, the Court applied a two-level enhancement in offense level for obstruction of justice, again over objection. *See U.S.S.G.* § 3C1.1.

Mitrione, therefore, had a total offense level of 16. He had zero criminal history points, placing him into criminal history

category I. With a total offense level of 16 and a criminal history category of I, Defendant Mitrione's U.S.S.G. range was 21 to 27 months imprisonment. The Court sentenced Mitrione to 23 months imprisonment on each of Counts 12 and 14 to run concurrently, followed by a 3 year term of supervised release on each of Counts 12 and 14 to run concurrently, restitution in the amount of $11,255.65 to be paid jointly and severally with Defendant DeVore, a $200 special assessment, and no fine.

The Court, using the November 2001 version of the U.S.S.G., determined that Defendant DeVore had a base offense level of 6. Her offense level was increased by four levels, over objection, based on the Court's finding of an amount of loss of $11,255.65. *U.S.S.G.* § 2131.1(b)(1)(C) Again over defense objection, the Court imposed a two-level enhancement in offense level based on a finding of vulnerable victims, pursuant to U.S.S.G. § 3A1.1(b)(1). Finally, the Court applied a two-level enhancement in offense level for obstruction of justice, again over objection. *See U.S.S.G.* § 3C1.1.

DeVore, then, had a total offense level of 14. She had no criminal history, placing her in criminal history category I. This resulted in a U.S.S.G. range of 15 to 21 months imprisonment. The Court recognized as mitigating factors that DeVore had legitimate health problems and also that she was assisting family members who had serious health problems. The Court sentenced DeVore to 15 months imprisonment on each of Counts 12 and 14 to run concurrently, followed by a 3 year term of supervised release on each of Counts 12 and 14 to run concurrently, restitution in the amount of $11,255.65 to be paid jointly arid severally with Defendant Mitrione, a $200 special assessment, and no fine.

The Court on remand turns first to Defendant Mitrione. Mitrione contends that the procedure designated by the Seventh Circuit in *Paladino* does not adequately address the

constitutional violations that have occurred. *See Paladino*, 401 F.3d at 471. This argument, however, is outside the scope of the limited remand, and the Court will not address it. *See United States v. White*, 406 F.3d 827, 831 (7th Cir. 2005) ("The scope of a district court's power on remand is determined by the language of the order of remand."). Mitrione's arguments questioning the constitutionality of the application of Justice Breyer's majority opinion in *Booker* are similarly outside the scope of this Court's authority on remand.

For purposes of reexamining Mitrione's sentence, Mitrione draws the Court's attention to DeVore and her family's health problems, arguing that he needs to be with his wife to provide support and care. The Court will consider this factor in reexamining his sentence.

After *Booker*, the U.S.S.G. are no longer binding on the Court, yet they remain a factor for the Court to consider in sentencing. *United States v. Williams*, 410 F.3d 397 (7th Cir. 2005). The Court, therefore, must determine Mitrione's advisory U. S. S.G. range. Mitrione asks the Court to remove any sentencing enhancements that were added based on "judge found facts." *Defendant Robert T. Mitrione's Suggestions on Remand*, p. 5. However, under the advisory guideline system set out in *Booker*, which is binding on this Court, the enhancements were properly determined. *See Booker*, 125 S.Ct. at 769.

Mitrione further asserts that the Court should reduce the $11,255,65 amount of loss by $2,580.27 for amounts not related to the counts of conviction. The Court included $2,580.27 in the amount of loss for "claims for which there was no support in the file substantiated."[2] *Transcript of Sentencing Hearing. October 31. 2002 (d/e 230)*, p. 162-63. The Court found this amount to be verifiably free of the

[2] The Court was referring to billings for which no services were reflected in the patients' files.

testimony of the Government witness who testified falsely. The Court further found this amount could properly be included in the amount of loss. *See Transcript, Vol. 24*, pp. 160-161. In reexaming Mitrione's sentence, the Court reaches the same conclusion. The Court further notes that on direct appeal the Court of Appeals affirmed this Court's inclusion of this amount in the order of restitution. *United States v. Mitrione*, 357 F.3d 712, 721 (7th Cir. 2004).

Additionally, Mitrione submits a letter, dated December 10, 2004, from the U.S. Department of Health and Human Services that states that the Department intended to retain $4,575.45 for claims submitted by Mitrione that it would have paid during the time payment to him was suspended. If retained, this amount must be credited as payment on the ordered restitution, but it does not alter the Court's determination of amount of loss or necessitate a new restitution order. Mitrione's challenges to the amount of loss fail. Therefore, the Court adopts the U.S.S.G. calculations set forth above in reconsidering Mitrione's sentence.

Considering the case file, the parties' position statements, Mitrione's PSR, the statements of counsel and the evidence submitted at the sentencing hearing, the evidence from trial, the applicable sentencing guidelines, and the sentencing factors set forth in 18 U.S.C. § 3553(a), the Court finds that, if it were required to resentence Defendant Mitrione, the Court would again sentence him to 23 months imprisonment on each of Counts 12 and 14 to run concurrently, followed by a 3 year term of supervised release on each of Counts 12 and 14 to run concurrently. The Court would impose restitution in the amount of $11,255.65 to be paid jointly and severally with Defendant DeVore, a $200 special assessment, and no fine. In light of the Court's view of the evidence and the characteristics of Defendant Mitrione (set forth in detail on the record at the original sentencing hearing), the Court finds that a lower sentence would create unwarranted sentencing

disparities and be inconsistent with the ends of justice. Even when the Court considers the Guidelines as advisory and also weighs the other factors set forth in 18 U.S.C. § 3553(a), the Court is of the opinion that the sentence previously imposed is necessary and appropriate for Defendant Mitrione.

The Court turns next to Defendant DeVore. DeVore also challenges the constitutionality of the application of Justice Breyer's majority opinion in *Booker* to her case. Again, this argument is outside the scope of this Court's authority on remand, and the Court will not consider it. This Court is bound to apply both portions of *Booker*. *See Booker*, 125 S.Ct. at 769. After *Booker*, the U.S.S.G. are no longer binding on the Court, yet they remain a factor for the Court to consider in sentencing. *Williams*, 410 F.3d at 397. The Court, therefore, must determine DeVore's advisory U.S.S.G. range. DeVore joins in Defendant Mitrione's argument seeking to reduce the amount of loss and restitution by $4,575.45. This argument is rejected for the reasons set forth above. Therefore, the Court adopts the U.S.S.G. calculations set forth above in reconsidering DeVore's sentence.

DeVore draws the Court's attention to her current employment situation, as well as the serious medical problems of her family members. The Court considers this in reexamining DeVore's sentence. The Court notes that it considered the health conditions of DeVore and her family as mitigating factors in imposing her original sentence.

Considering the case file, the parties' position statements, DeVore's PSR, the statements of counsel and the evidence submitted at the sentencing hearing, the evidence from trial, the applicable sentencing guidelines, and the sentencing factors set forth in 18 U.S.C. § 3553(a), the Court finds that, if it were required to resentence Defendant DeVore, the Court would again sentence her to 15 months imprisonment on each of Counts 12 and 14 to run concurrently, followed by a 3 year term of supervised release on each of Counts 12 and 14 to run

concurrently. The Court would also order restitution in the amount of $11,255.65 to be paid jointly and severally with Defendant Mitrione, a $200 special assessment, and no fine. A lower sentence would create unwarranted sentencing disparities and be inconsistent with the ends of justice. Again, even when the Court considers the Guidelines as advisory and also weighs the other factors set forth in 18 U. S.C. § 3553(a), the Court is of the opinion that the sentence previously imposed is necessary and appropriate for Defendant DeVore.

THEREFORE, if this Court were required to resentence Defendant Mitrione, under a system in which the U.S.S.G. were advisory rather than mandatory, the Court would sentence him to 23 months imprisonment on each of Counts 12 and 14 to run concurrently, followed by a 3 year term of supervised release on each of Counts 12 and 14 to run concurrently. The Court would impose restitution in the amount of $11,255.65 to be paid jointly and severally with Defendant DeVore and a $200 special assessment, but would not order a fine. This is the same sentence that the Court previously imposed on Mitrione. *Order, November 25, 2002 (d/e 238)*. If this Court were required to resentence Defendant DeVore, under a system in which the U.S.S.G. were advisory rather than mandatory, the Court would sentence her to 15 months imprisonment on each of Counts 12 and 14 to run concurrently, followed by a 3 year term of supervised release on each of Counts 12 and 14 to run concurrently. The Court would impose restitution in the amount of $11,255.65 to be paid jointly and severally with Defendant Mitrione, a $200 special assessment, and no fine. This is the same sentence that the Court previously imposed on DeVore. *Id.* The Clerk is directed to return the case, including a copy of this Opinion, to the Court of Appeals.

IT IS THEREFORE SO ORDERED.

ENTER: July 20, 2005.

FOR THE COURT:

/s/ Jeanne E. Scott
JEANNE E. SCOTT
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 02-4222 & 02-4224

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT T. MITRIONE and MARLA A. DEVORE,
Defendants-Appellants.

DOCKET ENTRY

DATE	PROCEEDINGS
5/19/05	ORDER: The Supreme Court has remanded this case to us for reconsideration in light of *United States v. Booker*, 125 S. Ct. 738 (2005). The defendants, Robert Mitrione and Marla DeVore, were convicted of Medicare and Medicaid fraud. The district court sentenced Mitrione to 23 months in prison, while DeVore received 15 months. The court applied the sentencing guidelines and calculated the defendants' sentences based on factual findings that were not proven to a jury beyond a reasonable doubt. When the court imposed these sentences, the guidelines were mandatory, which is no longer the case after *Booker*. Because neither defendant objected to the district court's use of the guidelines, we review under the plain error test. The sentences imposed, under the old mandatory regime, satisfy the first two prongs of the four-prong test for plain error. *See United States v. Paladino*, 401

F.3d 471, 481 (7th Cir. 2005). But we cannot determine whether these errors harmed the defendants, i.e., whether the court would have imposed the same sentences under an advisory guideline regime. Thus, we order a limited remand under the terms of *Paladino* so the district court may tell us whether the additional discretion afforded by *Booker* would affect the defendants' sentences. [1629491-1] [02-4222, 02-4224] (nath) [02-4222 02-4224]

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. 03-1668

ROBERT T. MITRIONE and MARLA A. DEVORE,
Petitioners,

v.

UNITED STATES.

January 24, 2005, Decided

Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *United States v. Booker*, 543 U.S. ___, 160 L. Ed. 2d 621, 125 S. Ct. 738 (2005).

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 02-4222 & 02-4224

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT T. MITRIONE and MARLA A. DEVORE,
Defendants-Appellants.

September 22, 2003, Argued
February 9, 2004, Decided

Before ROVNER, EVANS, and WILLIAMS, *Circuit Judges.*

OPINION

EVANS, *Circuit Judge.* Dr. Robert T. Mitrione, a psychiatrist, and Marla A. DeVore, his office manager, were indicted on charges of Medicaid and Medicare fraud. The alleged fraud involved billing for services that were not provided (ghost billing), overstating what services were provided (upcoding), and billing for services provided by others but declaring that Dr. Mitrione provided the service (substitute billing). The bulky indictment charged Mitrione and DeVore with one count of conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, eight counts of mail fraud, in violation of 18 U.S.C. § 1341, five counts of filing false claims, in violation of 18 U.S.C. § 287, and one count of health care fraud, in violation of 18 U.S.C. §§ 1347 and 2. After one of the mail fraud counts was dismissed, a jury, after

a 3-week trial, convicted Mitrione of everything except two of the counts and DeVore on 10 of the 14 counts against her. After the verdict, the defendants filed a motion for new trial based on newly discovered evidence claiming that a government witness committed perjury during the trial. The district court judge found that perjury indeed occurred and that it affected all of the defendants' counts of conviction except the two that only involved substitute billing. A new trial was ordered for all but these two counts, but the government decided not to retry the case. Mitrione was sentenced to a term of 23 months and DeVore to 15 months. Restitution for each was set at $11,255.65. Mitrione and DeVore appeal, raising a number of issues, but we will mention only those that have arguable merit. Before getting to that, we begin with the facts, with an emphasis on the "substitute billing" charges. And the facts, as they must be at this stage of the case, are presented in the light most favorable to the verdict.

Dr. Mitrione established a psychiatric practice in Springfield, Illinois, in the early 1990's. With his wife, Cecelia, who was his assistant at the time, he learned the billing aspect of the business. In 1991, Mitrione applied to become a Medicaid provider with the Illinois Department of Public Aid (IDPA), the agency that administers the program in Illinois. Both Mitriones received IDPA billing training, which included the handling of forms and CPT[1] codes. Dr. Mitrione also received an IDPA provider manual for physicians and signed an IDPA agreement which included specific requirements for billing Medicaid. He agreed to comply with all current and future policy provisions as set forth in the applicable medical assistance handbooks. At the time, one policy provided that physicians could not be paid under Illinois Medicaid for

[1] CPT refers to "Current Procedural Terminology." CPTs are listed in a book of codes used for medical billing which is published by the American Medical Association.

psychiatric services provided by employees under their supervision. The handbook for physicians provided:

> The provision of psychiatric services is limited . . . and must be *personally* provided by the physician who submits charges. Services provided by a psychologist, social worker, etc. are not reimbursable.

Mitrione also enrolled as a provider with the Medicare Part B system, which, like Medicaid, is a "fee for service" program. Under certain circumstances, Medicare (unlike Illinois Medicaid) allows providers to delegate certain psychological services to others in their employ. Medicare regulations require those services to be (1) medically necessary; (2) an integral yet incidental part of a physician's professional service; (3) commonly provided in a physician's office; (4) either rendered without charge or included in the physician's bill; (5) representative of an expense incurred by the physician or nonphysician in his or her professional practice; (6) performed under the direct supervision of the physician, nonphysician, or physician-directed center; and (7) initiated or managed by the employing physician.

The Medicare manual states that to fulfill the "direct supervision" requirement, a physician—not a proxy—must be present in the same office so he can intervene in case an emergency arises. The Medicare rules did not allow payment for the services of unlicensed mental health providers, even if a physician was in the area when the service was provided.

In 1992, Mitrione expanded his practice to include patient care at the Mental Health Center of Central Illinois (MHC), a state-funded, nonprofit mental health clinic in Springfield. Mental health clinics funded by the State of Illinois differ from private physician practices. Specifically, these clinics are permitted to bill Medicaid for nonphysician services.

In September 1994, the Mitriones fell behind in their billing. It was at that time that Mitrione brought Marla DeVore, a counselor whom he met at MHC, into his practice as a new office manager. He also moved his office to another site and renamed it Mitrione and Associates (M&A). Mitrione and DeVore apparently got along well—they were married in 2001 (Mitrione and Cecelia were divorced in 1997) after the indictment in this case was returned.

When she came on board, DeVore recruited Shari McGowan, a nurse at the MHC, to help her set up a billing system. DeVore taught McGowan how to enter billing information on M&A's computer.

DeVore and Mitrione designed a "superbill" which contained the five codes primarily used in the practice. Typically, the doctor or a therapist who provided the service placed his name on the superbill and added a checkmark next to the code to indicate the service provided. The superbills, therefore, provided essential information that M&A employees used to prepare claim forms. The evidence at trial disclosed that soon after Mitrione and DeVore became aware of official inquiries into their billing practices, they ordered the destruction of several years worth of superbills.

Mitrione and DeVore instituted a policy to bill IDPA for the services of nonphysicians and caused their billing clerks to substitute Mitrione's name for that of a nonphysician on the claim forms sent to IDPA. To do this, the clerks changed the name of the service provider when manually filling out the IDPA billing forms.

DeVore reviewed the claims before they were sent to Medicare, IDPA, or various insurance companies. She also reviewed rejected claims and instructed McGowan how to rebill. If McGowan had a problem with a CPT code or with a billing issue that DeVore could not resolve, she asked Mitrione what to do.

In 1995, Mitrione hired a few nonphysicians to provide services to M&A's clientele. For example, he hired a social worker, Dana Ingram, and counselors Ron Havens and Cathy Walters. When those employees quit, he hired Terry Kuethe Goff, an unlicensed intern who was working to complete requirements for an advanced psychology degree, and Walter Woods, a drug and alcohol counselor.

Woods had been a director of Gibralter, Ltd., a failing drug and alcohol rehabilitation center in Springfield. Certain drug and alcohol centers qualify for a special certification from the State of Illinois similar to the provision for mental health facilities. Through this certification, a center may submit billings for nonphysician counselors working under the supervision of a physician. During this time, however, there was a moratorium that precluded additional drug and alcohol certifications of this type in Sangamon County, where Springfield is located.

Over the next several months, Mitrione, DeVore, and Woods made several unsuccessful attempts to secure the drug and alcohol counseling licenses and billing privileges that belonged to Gibralter and to obtain similar licenses and billing privileges for their own practice. The Gibralter Medicaid certificate was ultimately terminated, and M&A was unable to obtain authority to bill Medicaid for nonphysician drug and alcohol services.

Since Woods held only an alcohol and drug counseling certificate, he was not licensed to provide mental health services. Both defendants knew they could not bill Medicaid for Woods' services. Nevertheless, shortly after the Gibralter transfer was denied, Woods' role was expanded by assigning him Medicaid clients. Mitrione and DeVore directed him to counsel patients with diagnoses other than drug and alcohol addition. Goff objected to both Mitrione and DeVore, saying that Woods was acting beyond his certification. Mitrione and

Devore also assigned Goff a full caseload of Medicaid and Medicare clients, despite her lack of license and private clinical experience.

The essence of the substitute billing charges was that Mitrione and DeVore assigned Medicaid and Medicare patients to counselors and therapists for treatment and then billed as though Mitrione either provided the service himself or directly supervised the service.

Shortly after she joined M&A, DeVore asked Sheryl Walters, a billing employee with MHC, how M&A could bill Medicaid for counselors' or therapists' services. Walters explained that M&A could not bill for those services because it was not a licensed not-for-profit mental health clinic. Shortly thereafter, Walters told Mitrione the same thing when he inquired about billing for therapists. During an advanced IDPA seminar, which Mitrione attended in October 1996, it was confirmed that Medicaid would not pay for psychiatric services performed by non-physicians.

In the spring of 1996, M&A formed a therapy group for the survivors of sexual abuse (SOSA). The group was made up of women who survived sexual trauma, molestation, or rape in their childhood. Neither DeVore nor Goff, who initially ran the group, were licensed to practice in this area.

The first SOSA group meeting was held in May 1996. Because of the abuse suffered by members of the group, they were often fragile and volatile and, as a result, discussions during the sessions were at times personal and painful. According to a psychiatric expert, if not handled carefully, the group members could have been hurt further.

Shortly after the program started, DeVore and Mitrione assigned Woods to co-facilitate the SOSA group sessions with Goff. When Goff objected that Woods was unqualified to co-lead the group, they reminded her that she was a "supervisee," that is, an intern who needed Mitrione's supervision

for her advanced degree and eventual license. Goff nevertheless complained weekly to Mitrione that Woods' actions and demeanor in the group were inappropriate.

Woods, too, told both DeVore and Mitrione that certain therapy sessions were beyond his training levels, though he continued with them. He was even assigned to do individual therapy with some members of the group. He also handled several group sessions by himself. The defendants then billed as if Mitrione had provided the service. Some of these billings for Woods were signed and submitted by DeVore.

In addition to billing IDPA, Mitrione and DeVore billed Medicare for Woods' work with the SOSA group and counseling of clients. Medicare would not have paid for the service if it knew that the group was being run by a drug and alcohol counselor with no other licensing, certification, or education. Even if Goff had been in the group with Woods, Medicare would not have paid because Goff was not licensed and Mitrione was not present in the office and available to intervene if an emergency arose.

Unlike their defense to the ghost billing and upcoding charges—that they were simply inept billers—the defendants defended the substitute billing charges by claiming ignorance of the rules. Mitrione claimed that he did not receive the physicians handbook, or that he tossed it away without reading it. DeVore, on the other hand, claimed that she was unaware the handbook existed. In addition, both Mitrione and DeVore claimed that Gary Vaughn (who died before the trial), an IDPA representative, told them that the substitute billing practice was acceptable.

The evidence, however, demonstrated that Mitrione received the physicians handbook (which contained the billing prohibition) at least three times: (1) when he first enrolled as a provider; (2) when he was trained; and (3) when he attended

an IDPA seminar in October 1996. Additionally, Mitrione pointed to the manual in his office when interviewed by investigators.

Moreover, neither defendant mentioned to the investigators that Vaughn had sanctioned their substitute billing practices. In December 1999, Mitrione phoned the IDPA Office of Inspector General to inquire about the investigation and to try to convince investigators that any billing issues were the work of a former employee. Mitrione never suggested at that time that Vaughn sanctioned the improper billing methods that were used. Nor could Mitrione explain why the issue even came up with Vaughn, since DeVore and he claimed that they did not know about the prohibition against billing for nonphysician services.

We turn now to the defendants' claim that the perjury at trial tainted their convictions on the substitute billing counts. During the rebuttal phase of the trial, the government offered the testimony of Deanna Statler, an IDPA auditor. She presented a summary which included information about the frequency of ghost billing and upcoding. Mitrione (DeVore, unless otherwise noted, joins all of these arguments, and our references from now on to "Mitrione" apply to both defendants), in defense, claimed that the ghost billing and upcoding were just mistakes, but Statler testified that these "mistakes" were almost always in the defendants' favor. The implication of this testimony was that the defendants were lying because if they had just been mistaken, there would have been as many mistakes against their interests as there were in their favor.

Statler's testimony, however, was not the truth, the whole truth, and nothing but the truth. She claimed she counted certain things herself when doing her audit, but she actually had others do much of it for her. She said she excluded some numbers from her calculations but hadn't, which made the numbers look worse for the defendants than they really were.

This perjury, reasoned Judge Scott in the district court, entitled the defendants to a new trial on most, but not all the counts upon which they were convicted. We review the decision to deny the new trial motion on two of these counts for an abuse of discretion. *United States v. Westmoreland*, 240 F.3d 618, 637 (7th Cir. 2001).

In determining whether a new trial is warranted when a witness presented by the government has lied, we have traditionally used a test adopted 75 years ago in *Larrison v. United States*, 24 F.2d 82 (7th Cir. 1928). Under the *Larrison* test, new trials are granted when (1) the witness is material and the testimony false; (2) the jury *might* have reached a different verdict if it knew the testimony was false or if it hadn't heard the testimony; and (3) the defense was taken by surprise by the false testimony or didn't learn of its falsity until after trial.

This old test puts our circuit at odds with other circuits which, absent a finding that the government knowingly sponsored the false testimony, require a defendant seeking a new trial to show that the jury would *probably* have reached a different verdict had the perjury not occurred. *See, e.g., United States v. Williams*, 344 U.S. App. D.C. 64, 233 F.3d 592 (D.C. Cir. 2000); *United States v. Huddleston*, 194 F.3d 214, 217-21 (1st Cir. 1999); *United States v. Provost*, 969 F.2d 617, 622 (8th Cir. 1992); *United States v. Petrillo*, 237 F.3d 119, 123 (2nd Cir. 2000); *United States v. Krasny*, 607 F.2d 840, 844-45 (9th Cir. 1979); *United States v. Sinclair*, 109 F.3d 1527, 1532 (10th Cir. 1997). But see *United States v. Lofton*, 233 F.3d 313 (4th Cir. 2000); *Gordon v. United States*, 178 F.2d 896, 900 (6th Cir. 1949). We even criticized the *Larrison* test a dozen years ago. *See United States v. Mazzanti*, 925 F.2d 1026, 1029 (7th Cir. 1991).

Today, we overrule *Larrison* and adopt the reasonable probability test.[2] In order to win a new trial based on a claim that a government witness committed perjury, assuming as in this case that the government did not knowingly present the false testimony, defendants will have to prove the same things they are required to prove when moving for a new trial for other reasons. Defendants will have to show that the existence of the perjured testimony (1) came to their knowledge only after trial; (2) could not have been discovered sooner with due diligence; (3) was material; and (4) would probably have led to an acquittal had it not been heard by the jury. *See United States v. Gonzalez*, 93 F.3d 311 (7th Cir. 1996).

The defendants argue that Statler's false testimony was material and that it tainted their convictions on the substitute billing counts because it "tipped the scales" against them. However, Statler did not testify about the propriety of substitute billing or the defendants' knowledge that such claims were prohibited. Rather, she testified about the frequency of ghost billing and upcoding. Statler's summary included services rendered by therapists other than Mitrione, but it did not comment on whether those services were reimbursable. So Statler was really not a material witness with respect to the substitute billing counts.

Nevertheless, the defendants claim that Statler's testimony demolished their credibility, and without it the jury might have reached a different verdict. We disagree. For one thing, the evidence against Mitrione and DeVore on all counts, without Statler's testimony, was strong. The government also presented substantial evidence that the defendants knew they were engaging in impermissible substitute billing. Having reviewed this record, we do not believe that the jury would

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[2] Pursuant to *Circuit Rule 40(e)*, this opinion has been circulated among all the judges of this court in regular active service. No judge favored a rehearing en banc on the question of overruling *Larrison v. United States*.

have probably reached a different verdict on the substitute billing counts had Statler's testimony not been presented. And, we add, our review of the record would not lead us to conclude that the jury would have probably reached a result other than guilty on the upcoding and ghost billing counts had it not heard Statler's rebuttal testimony.

We turn next to the defendants' claim that the district court erred in not granting a new trial because the prosecutor referred to the September 11 terrorist attacks in his closing remarks. Closing arguments were supposed to begin on September 11, 2001, but they were delayed a day because of the attacks. On September 12, the prosecutor began his closing argument with this statement:

> Ladies and gentlemen. Good morning. Our job just got harder in the last 24 hours. We're already facing an incredibly difficult task as we've done for the last three and a half weeks trying to sort this out. It's now made more difficult by the events of yesterday, the devastation that terrorism has brought to our country. But that's why we need to do this today. That's why we got out of bed today and came here. The very institutions that these people seek to undermine must continue.

The district court overruled a defense objection to this remark, saying the defendants would also have a chance to comment briefly on the events of the day before. The prosecutor then continued:

> One of those systems is the system of justice. And that's one of our most important systems in the country, and that's something that we've all been a part of the last three and a half weeks. Every one of us. And that's why we need to redouble our efforts today to concentrate, to stay on task, to get back to pay attention to the evidence, no matter how hard it is after yesterday. What we do today is important. It is important certainly to

> Dr. Mitrione and Ms. DeVore. But it's important to the fiscal integrity of the Medicare program and Medicaid program and the medical assistance programs. It is important to our system of justice.

Mitrione's attorney began his closing with the following remarks:

> Now, [the prosecutor] this morning tried to draw some analogy or some connection between the events of yesterday and this case. I think he has lost all sense of proportion and prospective [sic]. And I don't want to minimalize or trivialize the destruction of yesterday by drawing any connection with this case. There's no connection.

DeVore's attorney also commented on the prosecutor's remarks, saying "other counsel have commented there are a lot of things going on in the world right now, but the most important thing in the world going on as far as Marla DeVore is your deliberations and what you think about her conduct."

We consider claims that a prosecutor has tainted a trial with improper remarks under a two-step inquiry. *See United States v. Renteria*, 106 F.3d 765, 766 (7th Cir. 1997). We first consider the remarks in isolation. If they are improper in the abstract, we then consider them in the context of the entire record and ask whether they denied the defendant a fair trial. Only if the remarks undermined the fairness of the proceedings will we overturn a conviction.

There is nothing in the remarks by the prosecutor here that would warrant a move to the second step of our inquiry. Even viewed in isolation, the prosecutor's remarks were not improper. In fact, given the horrific events of September 11, we think it would have been strange indeed if anyone connected with this trial and allowed to speak to the jury on September 12—judge, prosecutor, or defense counsel—failed

to briefly comment on the attacks. The prosecutor's words were about terrorists and the need to get back to business despite the devastating attacks. They were not improper.

The defendants also argue that the Illinois statutes underlying their convictions for Medicaid and Medicare fraud are in conflict with, and therefore preempted by, federal law. Judge Scott rejected this argument when it was raised in the context of a motion to dismiss the substitute billing counts of the indictment, finding that it ignores basic rules of statutory construction and the State of Illinois' discretion to adopt standards for its medical assistance programs. We agree with Judge Scott's treatment of this issue and have nothing to add to it. *See United States v. Mitrione*, 160 F. Supp. 2d 993 (C.D. Ill. 2001).

We now turn to two sentencing issues—one an enhancement and the second a challenge to the restitution order. Judge Scott imposed a 2-level obstruction of justice enhancement under U.S.S.G. § 3C1.1 on both defendants after finding that they testified falsely at the trial. DeVore contends that she did not testify falsely and that the district court clearly erred in imposing the enhancement. Mitrione says, in his main brief, that he adopts the arguments in DeVore's brief; DeVore's brief, however, neither mentions Mitrione's obstruction enhancement nor argues that it was improper. The government's brief pointed this out, and Mitrione's reply brief ignores the point. So, as to him, this argument is waived or, more charitably, rejected as not developed.

Our review of obstruction of justice enhancements is "very limited." *United States v. Ramunno*, 133 F.3d 476, 480 (7th Cir. 1998). The determination that DeVore obstructed justice is a factual finding which we will not disturb unless it is clearly erroneous. To meet this standard, DeVore must convince us "to a certainty that the district court's factual findings were incorrect; merely suggesting the possibility of error is not enough." *Id.* at 480-81 (citing *Anderson v. City of*

Bessemer City, 470 U.S. 564, 573, 84 L. Ed. 2d 518, 105 S. Ct. 1504 (1985)). This is an especially daunting task here as the district court's factual finding is based on an assessment of credibility, and we give special deference to the trial judge's unique opportunity to follow the case up close, here for more than 3 weeks.

DeVore repeatedly testified that she was not the biller for M&A. Judge Scott found that DeVore testified that, prior to 1997, she played no role in billing except to fold, mail, and sign the bills. The judge found that DeVore's testimony was contradicted by several witnesses at trial, implicitly found those witnesses to be more credible, and concluded that DeVore testified falsely. Now, rather than argue that her statements at trial were mistaken or the result of confusion, she maintains that her testimony was truthful and claims that the government presented no contrary testimony. We reject this claim.

As the district court found, several witnesses, including McGowan, Goff, Woods and others, established through their testimony that DeVore "orchestrated the billing processes throughout that office." These witnesses testified that DeVore instructed them on how to: (1) bill; (2) interpret codes; (3) resubmit bills that had been rejected; and (4) change the listed service date on a bill to avoid rejection of a bill for a second service on one date.

So, while DeVore maintains that her testimony was true, her claim simply cannot be squared with the evidence. In light of the testimony, the district court properly found that DeVore's statements that prior to 1997 she played no significant role in billing were false.

The district court also properly found that the testimony was material to the counts of conviction because its purpose was to mislead the jury into thinking DeVore had no decisionmaking authority in billing when clearly she did. *See*

United States v. Freitag, 230 F.3d 1019, 1025 (7th Cir. 2000) (district court's finding that Medicare fraud defendant's testimony was "a creative revision of what had happened" sufficiently found intent required to support perjury-based sentence enhancement).

DeVore also claims that the district court clearly erred in finding that she testified falsely when she said she did not participate in the decision to have Woods lead the SOSA group. While DeVore states that "no contrary testimony was offered," Judge Scott found that her testimony was contradicted by Woods, Mitrione, and Goff. Applying an obstruction enhancement to DeVore's guideline range was not error.

Finally, the defendants argue that Judge Scott erred in ordering them to reimburse Medicare because, according to them, the victim of their fraud (if in fact there was a fraud) was Medicaid. At sentencing, however, the defendants did not object to the restitution order on the ground that they now advance, *i.e.*, that Medicaid--not Medicare—was the victim of their fraud. Instead, they argued that the district court improperly calculated the amount of restitution owed. In fact, the defendants contended that the total loss to Medicare was $2,144.58 and that Medicaid should be paid nothing. So, on this record, they forfeited the issue, and our review is only for plain error. *United States v. Randle*, 324 F.3d 550, 555 (7th Cir. 2003).

Since Mitrione and DeVore were convicted of fraud, Judge Scott's authority to impose restitution is governed by the Mandatory Victim Restitution Act (MVRA) codified at 18 U.S.C. § 3663A and 18 U.S.C. § 3664. The relevant portions of the MVRA provide:

> (a)(1) Notwithstanding any other provision of law, when sentencing a defendant . . . the court shall order, in addition to . . . any other penalty authorized by law, that the defendant make restitution to the victim of the offense . . . .

> (2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense *that involves as an element a scheme, . . . any person directly harmed by the defendant's criminal conduct in the course of the scheme* . . . .

18 U.S.C. § 3663A(a)(1)-(2) (emphasis added). Thus, while restitution is limited to the counts of conviction, when the counts of conviction involve a scheme, restitution may be ordered for all of the harm caused by the defendant's criminal conduct in the course of the scheme. *See Randle*, 324 F.3d at 556; *United States v. Martin*, 195 F.3d 961, 967 (7th Cir. 1999).

Based upon Judge Scott's finding that the total loss caused by the defendants' fraud was $11,255, she ordered the defendants to pay restitution in that amount. We see no plain error in this order. As the judge found, both Medicaid and Medicare were victimized by the defendants' fraud, and a restitution order need not be limited to those harmed by the conduct that formed the basis for a conviction. To the contrary, the statute defines "victim" as any person directly harmed by the defendant's criminal conduct in the course of the scheme. *Martin*, 195 F.3d at 967. *See Randle*, 324 F.3d at 556 ("restitution is authorized under the MVRA . . .to a victim who is directly harmed by the offender's conduct in the course of committing an offense that involves *as an element* a scheme . . . .").

Here, the defendants were convicted of one count of mail fraud and one count of filing false claims. These counts adopted parts of counts 1 and 2, which charged the defendants with devising a scheme to defraud the Medicaid and Medicare programs of the State of Illinois and the United States. Thus, they were convicted of offenses which triggered the broad definition of "victim" under the MVRA quoted

above. Thus, because the defendants' crime included a scheme, and there is evidence that the scheme directly harmed a victim, *i.e.*, Medicare, other than the victim mentioned in the counts for which the defendants were convicted, *i.e.*, Medicaid, Judge Scott did not plainly err in ordering restitution to Medicare.

For these reasons, the judgment of the district court is AFFIRMED.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS,
SPRINGFIELD DIVISION

No. 00-30021

UNITED STATES OF AMERICA,
Plaintiff,

v.

ROBERT T. MITRIONE and MARLA A. DEVORE,
Defendants.

July 6, 2001, Decided

ORDER

JEANNE E. SCOTT, U.S. *District Judge*:

This matter is before the Court on Defendants Mitrione and Devores' Motion for Partial Dismissal of the Indictment, Motion to Strike and Motion in Limine. For the reasons set out below, Mitrione and Devores' Motion for Partial Dismissal of the Indictment is DENIED, Motion to Strike is DENIED, and Motion in Limine is DENIED.

Defendants argue that all references to substitute billing (i.e., submitting claims under Mitrione's provider number for services performed by others) as a fraudulent billing scheme should be dismissed or struck from the indictment as well as banned from the trial since substitute billing does not violate state or federal law. Defendants claim that information provided by the Government indicates that Counts 2, 7, 8, 11, 12, and 13 are partly based on the substitute billing theory,

and they claim that such billing is perfectly legal under both state and federal law. They further claim that *Federal Rule of Criminal Procedure 12(b)* permits the Court to resolve the issue now. The Court finds, however, that substitute billing is not permitted under the Illinois Medicaid statutory reimbursement provisions and regulatory provisions promulgated pursuant to those provisions. (Counts 2 and 11). The Court further finds that Counts 12 and 13 allege that the Defendants caused payments to be made for work done by a totally unqualified person, which if true, would not qualify as substitute billing in any event. Finally, Counts 7 and 8 allege that Defendants submitted a false claim knowing the claim was at least partially false. Since the Government is not required to plead its evidence, the Court cannot tell if the evidence on these Counts goes beyond the substitute billing theory which, in some instances, would be permitted with respect to the Medicare reimbursement claims in these Counts. In short, there are factual issues which preclude dismissal of any count of the indictment.

First, Defendants have argued that there is no state or federal law which prohibits substitute billing. Defendants claim the handbook provision cited by the Government in Count 2 of the indictment (A-210.7 of the "Medical Assistance Program Handbook" published by the Illinois Department of Public Aid) does not carry the effect of law and that no law is in accord with it. That provision indicated that reimbursement under Illinois Medicaid rules for psychiatric services would be limited to those which had been personally provided by the physician who submitted the bill. Defendants contend that this handbook provision is nothing more than an interpretation of the law and one which is incorrect.

The Court agrees that the handbook is only an interpretation of the law and does not carry the import of law itself. *See State of Indiana Department of Welfare v. Sullivan*, 934 F.2d 853 (7th Cir. 1991). However, in this instance the

handbook interpretation conforms to the language of the Illinois Administrative Code (Code), which does carry the force of law. Section 140.411 of the Code provides, in relevant part, that physicians will be reimbursed for services not otherwise excluded which are provided by the physician or by a member of the physician's staff under the physician's direct supervision. Section 140.413 of the Code is entitled "Limitation on Physician Services." It provides, in relevant part: "(a) When provided in accordance with the specified limitations and requirements, the Department shall pay for the following services: . . . (4) Psychiatric Services (A) Treatment—when the services are provided by a physician who has been enrolled as an approved provider with the Department. . . ."

Defendants have read the general provision for physician reimbursement (Section 140.411) as modifying the limiting clause for reimbursement for psychiatric services (Section 140.413), when the Code reads just the opposite. Defendants have argued that since psychiatrists are physicians, the reference to "services provided by a physician" in Section 140.314 encompasses work done by members of the psychiatrist's staff under his direction, as provided in Section 140.411. If that were the case, then there would be no need for this provision under Section 140.413. The plain language of the Code indicates that Section 140.413 limits Section 140.411. In addition basic rules of statutory construction provide that specific provisions control over the general. *Hernon v. E.W. Corrigan Const. Co.*, 149 Ill. 2d 190, 172 Ill. Dec. 200, 595 N.E.2d 561 (1992); *First Bank of Oak Park v. Avenue Bank and Trust Co. of Oak Park*, 605 F.2d 372 (7th Cir. 1979). For Medicaid reimbursement for psychiatric services, Illinois requires that the services actually be provided by the physician and not by members of his staff under his direct supervision. The reference to the Handbook provision in the indictment is therefore of no consequence since the language quoted from the Handbook conforms to

the language of the Code. The various counts adequately set out the offenses charged.

Defendants next argue that the Government required forms, to be used by a physician seeking either Medicaid or Medicare reimbursement, have a certification which the doctor must sign which states that the services for which reimbursement were sought were medically necessary and that they were personally furnished by the physician or by an employee who was under his personal direction. Defendants argue that the certification on the forms is further proof that psychiatric services performed by a physician's staff, under his direction, may be reimbursed.

The forms cannot change the requirements of law, however. Defendants may point to the forms and argue that they were confusing or misleading, if that is their position. Such a contention would go to the Defendants' intent and be relevant. This argument is not a basis for dismissing or striking parts of the indictment, however.

Finally, Defendants have argued that Medicare reimbursement rules allow substitute billing and that at least Counts 7, 8, and 14 should be dismissed. Those Counts, according to the Defendants' motion, are based in part on substitute billing for Medicare reimbursement. Even though the Government has conceded in its Response to the Motion that Medicare regulations (unlike Medicaid regulations) permit reimbursement in some circumstances for psychiatric services provided by a physician's employees under his direction, the Government did not concede the motion. The Court will need to hear the evidence, since it is unclear whether the substitute billing was otherwise proper. In addition, those Counts have other bases than just the substitute billing—they also allege that the claims were either partially false or not rendered to the extent claimed. Defendants' contention that the Court should limit the Government's evidence at trial is rejected in the absence

of a showing of any discovery rule violation by the Government.

THEREFORE, Defendants' Motion for Partial Dismissal of the Indictment (d/e 55-1) is DENIED; Defendants' Motion to Strike (d/e 55-2) is DENIED, and Defendants' Motion in Limine (d/e 55-3) is DENIED. Defendants' Motion to Extend Time to File Reply (d/e 59) is ALLOWED, and the Court has considered the Reply (d/e 60) filed by the Defendants on May 30, 2001, in connection with its rulings on the above motions. IT IS THEREFORE SO ORDERED.

ENTER: 7/6, 2001.

FOR THE COURT:

JEANNE E. SCOTT
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

[Filed April 7, 2000]

Cause No. 00-30021

18 U.S.C. § 2
18 U.S.C. § 287
18 U.S.C. § 371
18 U.S.C. § 1341
18 U.S.C. § 1347

UNITED STATES OF AMERICA
Plaintiff,

v.

ROBERT T. MITRIONE AND MARLA A. DEVORE
Defendants.

INDICTMENT

THE GRAND JURY CHARGES:

Count 1

1. From in or about October 1, 1994 through in or about January 3, 1998, the exact dates being unknown to the Grand Jury,

ROBERT T. MITRIONE and
MARLA A. DEVORE,

defendants herein, did unlawfully and knowingly combine, conspire, confederate and agree with each other, and with persons known and unknown to the Grand Jury, to commit

one or more of the following offenses against the United States:

a. To wilfully submit to the United States Department of Health and Human Services, through the Illinois Department of Public Aid and/or the Health Care Services Corporation, claims for services allegedly provided, knowing such claims to be false, fictitious or fraudulent in violation of Title 18, United States Code, Section 287;

b. To devise a scheme or artifice to defraud, or to obtain money or property by means of false or fraudulent pretenses, representations or promises, through the use of the United States mail in violation of Title 18, United States Code, Section 1341;

c. To knowingly and willfully execute, or attempt to execute, a scheme or artifice to defraud any health care benefit program and to obtain, by means of false and fraudulent pretenses, representations and promises, any of the money or property owned by, or under the custody and control of, any health care benefit program in connection with the delivery of and payment for health care benefits, items, and services in violation of Title 18, United States Code, Section 1347; and

d. To defraud the United States.

2. At all times material to this indictment, Medicare was a program established by the federal government as a health care benefit program for the elderly and disabled as part of the Social Security Act, and codified in Title 42 of the United States Code. Medicare provided free or below-cost health care benefits to eligible beneficiaries, primarily individuals who were at least sixty-five years of age or who had certain disabilities. Medicare is administered nationally by the Health Care Financing Administration, and at the local level by "carriers" who handle claims from providers such as physicians.

3. The Health Care Financing Administration (HCFA) established procedures to compensate physicians for services provided to the disabled and elderly qualified under the Medicare program. In the State of Illinois, HCFA administered the Medicare program through a private insurance carrier, the Health Care Service Corporation (HCSC). Under that administration, HCSC reviewed and processed claims for medical reimbursement submitted by Medicare providers, and made payment on those claims which appeared to be eligible for medical reimbursement under the Medicare program. Such payment involved federal funds. Providers were required to submit invoice forms to HCSC which received, processed and authorized payment to providers for services covered under the Medicare program according to the rules, regulations and procedures established.

4. The Medicaid program of the United States and the State of Illinois was established in 1965 to provide medical assistance to indigent persons. At all times material herein, the Illinois Department of Public Aid (IDPA), administered the Medicaid program for the State of Illinois. The United States of America provided at least one half of the money for the Medicaid program, with the remaining cost provided by the State of Illinois.

5. The Illinois Department of Public Aid established procedures in accordance with the regulations of the United States Department of Health and Human Services (HHS) to compensate physicians for services provided to medical assistance recipients. Providers were required to submit invoice forms to IDPA which received, processed and authorized payment to providers for services covered under the Medicaid program according to the rules, regulations and procedures established.

MANNER AND MEANS OF THE CONSPIRACY

Billing for Services Performed by Unqualified Therapist

6. It was a part of the conspiracy that ROBERT T. MITRIONE and MARLA A. DEVORE would submit and cause to be submitted claims to health care plans, including Medicaid, Medicare, and other health care plans and private individuals for services performed by one or more unqualified individuals.

Billing for Services of Robert T. Mitrione Rendered by Others

7. It was a further part of the conspiracy that ROBERT T. MITRIONE and MARLA A. DEVORE would submit and cause to be submitted claims to health care plans, including Medicaid, Medicare and other health care plans through the use of his individual provider number, which represented that individual medical psychotherapy had been rendered by a medical doctor, and which would therefore be covered by the payer's plan when, in truth and in fact, services had been provided by others whose services were not covered by the payer's plan, or were not covered without a provider number issued individually to that counselor.

Billing for Services Never Rendered (False Billing)

8. It was a further part of the conspiracy that ROBERT T. MITRIONE and MARLA A. DEVORE would submit and cause to be submitted claims to health care plans, including Medicaid, Medicare and other health care plans for services that were not performed.

Billing Medication Management As Psychotherapy (Upcoding)

9. It was a further part of the conspiracy that ROBERT T. MITRIONE and MARLA A. DEVORE would submit and cause to be submitted claims to health care plans, including

Medicaid, Medicare and other health care plans for services using CPT codes 90843 (20-30 minute therapy session) and 90844 (45-50 minute therapy session) when in truth and fact, only brief visits and medication management with the patient had occurred, which could have been billed at a lower rate under CPT Code 90862 (pharmacologic management).

10. In furtherance of the conspiracy and to effect its objects,

ROBERT T. MITRIONE and
MARLA A. DEVORE,

defendants herein, committed one or more of the following overt acts:

OVERT ACTS

11. During the time of the conspiracy, ROBERT T. MITRIONE, MARLA A. DEVORE and others at their direction, submitted various claims to IDPA for payment by the State of Illinois Medicaid program, which claims included requests for payment for services provided by Dr. Robert T. Mitrione which in fact had not been provided by Dr. Robert T. Mitrione or not provided to the extent claimed.

12. During the time of the conspiracy, various claims were submitted by ROBERT T. MITRIONE, MARLA A. DEVORE and others at their direction to IDPA for payment by the State of Illinois Medicaid program and to HCSC for payment by the Medicare program, which claims included requests for payment for services provided by one or more persons unqualified to conduct such services.

13. During the time of the conspiracy, various claims were submitted by ROBERT T. MITRIONE, MARLA A. DEVORE and others at their direction to IDPA for payment by the State of Illinois Medicaid program and to HCSC under the Medicare program, which claims included requests for payment for services provided by Dr. Robert T. Mitrione or others, when in fact, no services were performed.

All in violation of Title 18, United States Code, Section 371.

THE GRAND JURY FURTHER CHARGES:

Count 2

1. The Grand Jury realleges and reaffirms the allegations in paragraphs 1 through 13 of Count 1 of this indictment as though fully set forth herein.

2. From at least on or about October 1, 1994 through on or about January 3, 1998, in the Central District of Illinois,

ROBERT T. MITRIONE and
MARLA A. DEVORE,

defendants herein, did knowingly and intentionally devise and intend to devise a scheme and artifice to defraud the Medicaid and Medicare programs of the State of Illinois and the United States of America.

3. At all times material to this scheme to defraud, ROBERT T. MITRIONE was a medical doctor specializing in psychiatry and doing business as "Mitrione and Associates" from an office located in Springfield, Illinois.

4. At all times material to this scheme to defraud, MARLA A. DEVORE was the "office manager" for Mitrione and Associates. As such, she was in charge of the process of scheduling patients and billing for services rendered by Dr. Mitrione and others involved with Mitrione and Associates. As part of this employment, DEVORE supervised and trained others who participated in scheduling patients and billing for services.

5. At all times material to this indictment, as outlined in Count 1 of this indictment, IDPA had certain rules and regulations which it published for providers in the Medicaid program. Among the published rules, regulations and procedures listed in the IDPA "Medical Assistance Program Hand-

book" were regulations regarding the types of psychiatric services which could be billed to IDPA. These regulations included section A-210.7, which, in part, provided:

> The provision of psychiatric services is limited to those services and associated procedure codes listed in Appendix A-19a and must be *personally* provided by the physician who submits charges. Services provided by a psychologist, social worker, etc. are not reimbursable.

6. At all times material herein, ROBERT T. MITRIONE was a "provider" under the Medicaid program. That is, ROBERT T. MITRIONE was approved by IDPA and the United States Department of Health and Human Services to administer services to Public Aid clients and to receive compensation for the services. In applying to be a Medicaid provider, ROBERT T. MITRIONE agreed, in writing, "on a continuing basis, to comply with all current and future program policy provisions as set forth in the applicable Department of Public Aid Medical Assistance Program handbooks."

7. In submitting claims to IDPA for services, the individual providing the service is identified by a unique "provider number." Thus, when the provider number issued individually to ROBERT T. MITRIONE was used in billing, IDPA was advised that the services were provided by ROBERT T. MITRIONE, a physician.

8. During the period of time from on or about October 1, 1994 through on or about January 3, 1998, ROBERT T. MITRIONE and MARLA A. DEVORE, and others at their direction and within their control and supervision, knowingly submitted claims to IDPA under the name and provider number of Robert T. Mitrione, M.D., when, in fact, it was known to both ROBERT T. MITRIONE and MARLA A. DEVORE that the services, if any, were provided by someone other than Robert T. Mitrione.

9. On or about August 18, 1995, in the Central District of Illinois,

ROBERT T. MITRIONE and
MARLA A. DEVORE,

defendants herein, for the purpose of executing said scheme did knowingly cause to be delivered by the United States mail, according to the direction thereon, an envelope containing a warrant (check) and remittance advice mailed from the State of Illinois Office of the Comptroller and mailed to Mitrione, Robert T., 3021 Montvale, Suite D, Springfield, Illinois 62704 which was a Medicaid payment for one or more services claimed to have been rendered by ROBERT T. MITRIONE on July 18, 1995 to a client identified as TB, as well as services claimed to be rendered on July 13, 1995 to a client identified as BD, which services were not rendered by ROBERT T. MITRIONE, or not rendered to the extent billed;

All in violation of Title 18, United States Code, Sections 1341 and 2.

THE GRAND JURY FURTHER CHARGES:

Count 3

1. The Grand Jury realleges and reaffirms the allegations in paragraphs 1 through 8 of Count 2 of this indictment as though fully set forth herein.

2. In addition to submitting bills which advised IDPA that the services were provided by ROBERT T. MITRIONE, during the period of time from October 1, 1994 through on or about January 3, 1998, claims were submitted to the Illinois Department of Public Aid for services that were not rendered, or not rendered to the extent billed. For example, claims were submitted to the Illinois Department of Public Aid for services allegedly performed for patients that were not rendered at all, bills were submitted for full psychotherapy sessions when only minimal sessions or medication management sessions were provided, and bills were submitted for office sessions that were either canceled or the patient did not

appear in the office of Mitrione and Associates on the date(s) indicated.

3. On or about November 14, 1997, in the Central District of Illinois,

ROBERT T. MITRIONE and
MARLA A. DEVORE,

defendants herein, for the purpose of executing said scheme did knowingly cause to be delivered by the United States mail, according to the direction thereon, an envelope containing a warrant (check) and remittance advice mailed from the State of Illinois Office of the Comptroller and mailed to Mitrione, Robert T., 3021 Montvale, Suite D, Springfield, Illinois 62704 which was a Medicaid payment for one or more services claimed to have been rendered by ROBERT T. MITRIONE on October 29, 1997 to a client identified as SO, which was not rendered by ROBERT T. MITRIONE, or not rendered to the extent billed;

All in violation of Title 18, United States Code, Sections 1341 and 2.

THE GRAND JURY FURTHER CHARGES:

Count 4

1. The Grand Jury realleges and reaffirms the allegations in paragraphs 1 through 8 of Count 2 of this indictment as though fully set forth herein.

2. On or about November 4, 1997, in the Central District of Illinois,

ROBERT T. MITRIONE and
MARLA A. DEVORE,

defendants herein, did present and cause to be presented to the Department of Health and Human Services, a Department of the United States of America, through the Illinois Department of Public Aid, a claim for services purportedly rendered

by ROBERT T. MITRIONE, M.D. on or about October 29, 1997 to a client identified as SO, knowing said claim was at least partially false, fictitious and fraudulent when made;

In violation of Title 18, United States Code, Sections 287 and 2.

THE GRAND JURY FURTHER CHARGES:

Count 5

1. The Grand Jury realleges and reaffirms the allegations in paragraphs 1 through 8 of Count 2 of this indictment as though fully set forth herein.

2. On or about October 16, 1997, in the Central District of Illinois,

ROBERT T. MITRIONE and
MARLA A. DEVORE,

defendants herein, for the purpose of executing said scheme did knowingly cause to be delivered by the United States mail, according to the direction thereon, an envelope containing a warrant (check) and remittance advice mailed from the State of Illinois Office of the Comptroller and mailed to Mitrione, Robert T., 3021 Montvale, Suite D, Springfield, Illinois 62704 which was a Medicaid payment for one or more services claimed to have been rendered by ROBERT T. MITRIONE on October 1, 1997 to a client identified as RF, which was not rendered by ROBERT T. MITRIONE, or not rendered to the extent billed;

All in violation of Title 18, United States Code, Sections 1341 and 2.

THE GRAND JURY FURTHER CHARGES:

Count 6

1. The Grand Jury realleges and reaffirms the allegations in paragraphs 1 through 8 of Count 2 of this indictment as though fully set forth herein.

2. On or about August 1, 1995, in the Central District of Illinois,

ROBERT T. MITRIONE and
MARLA A. DEVORE,

defendants herein, did present and cause to be presented to the Department of Health and Human Services, a Department of the United States of America, through the Illinois Department of Public Aid, a claim for services purportedly rendered by ROBERT T. MITRIONE, M.D. on or about July 18, 1995 to a client identified as TB, knowing said claim was at least partially false, fictitious and fraudulent when made;

In violation of Title 18, United States Code, Sections 287 and 2.

THE GRAND JURY FURTHER CHARGES:

Count 7

1. The Grand Jury realleges and reaffirms the allegations in paragraphs 1 through 8 of Count 2 of this indictment as though fully set forth herein.

2. On or about September 3, 1996, in the Central District of Illinois,

ROBERT T. MITRIONE and
MARLA A. DEVORE,

defendants herein, for the purpose of executing said scheme did knowingly cause to be delivered by the United States mail, according to the direction thereon, an envelope containing a check and "Medicare Remittance Notice" mailed from the Health Care Service Corporation (HCSC), and mailed to Robert T. Mitrione, M.D., 3021 Montvale, Suite D, Springfield, Illinois 62704-4262 which was a Medicare payment for one or more services claimed to have been rendered by ROBERT T. MITRIONE on June 14, 1996 to a client identified as KP, which was not rendered by ROBERT T. MITRIONE, or not rendered to the extent billed;

All in violation of Title 18, United States Code, Sections 1341 and 2.

THE GRAND JURY FURTHER CHARGES:

Count 8

1. The Grand Jury realleges and reaffirms the allegations in paragraphs 1 through 8 of Count 2 of this indictment as though fully set forth herein.

2. On or about August 3, 1996, in the Central District of Illinois,

ROBERT T. MITRIONE and
MARLA A. DEVORE,

defendants herein, did present and cause to be presented to the Department of Health and Human Services, a Department of the United States of America, through the Health Care Service Corporation, a claim for services purportedly rendered by ROBERT T. MITRIONE, M.D. on June 14, 1996 to a client identified as KP, knowing said claim was at least partially false, fictitious and fraudulent when made;

In violation of Title 18, United States Code, Sections 287 and 2.

THE GRAND JURY FURTHER CHARGES:

Count 9

1. The Grand Jury realleges and reaffirms the allegations in paragraphs 1 through 8 of Count 2 of this indictment as though fully set forth herein.

2. On or about September 2, 1996, in the Central District of Illinois,

ROBERT T. MITRIONE and
MARLA A. DEVORE,

defendants herein, did present and cause to be presented to the Department of Health and Human Services, a Department of the United States of America, through the Health Care Service Corporation, a claim for services purportedly ren-

dered on August 29, 1996 to a client identified as KP, knowing said claim was at least partially false, fictitious and fraudulent when made;

In violation of Title 18, United States Code, Sections 287 and 2.

THE GRAND JURY FURTHER CHARGES:

Count 10

1. The Grand Jury realleges and reaffirms the allegations in paragraphs 1 through 8 of Count 2 of this indictment as though fully set forth herein.

2. On or about November 13, 1997, in the Central District of Illinois,

ROBERT T. MITRIONE and
MARLA A. DEVORE,

defendants herein, for the purpose of executing said scheme did knowingly cause to be delivered by the United States mail, according to the direction thereon, an envelope containing a check and "Medicare Remittance Notice" mailed from the Health Care Service Corporation (HCSC), and mailed to Robert T. Mitrione, M.D. 3021 Montvale, Suite D, Springfield, Illinois 62704-4262 which was a Medicare payment for one or more services claimed to have been rendered on October 13, 1997 to a client identified as BD, which service was not rendered or not rendered to the extent billed;

All in violation of Title 18, United States Code, Sections 1341 and 2.

THE GRAND JURY FURTHER CHARGES:

Count 11

1. The Grand Jury realleges and reaffirms the allegations in paragraphs 1 through 8 of Count 2 of this indictment as though fully set forth herein.

2. On or about August 15, 1996, in the Central District of Illinois,

ROBERT T. MITRIONE and
MARLA A. DEVORE,

defendants herein, for the purpose of executing said scheme did knowingly cause to be delivered by the United States mail, according to the direction thereon, an envelope containing a warrant (check) and remittance advice mailed from the State of Illinois Office of the Comptroller and mailed to Mitrione, Robert T., 3021 Montvale, Suite D, Springfield, Illinois 62704 which was a Medicaid payment for one or more services claimed to have been rendered by ROBERT T. MITRIONE on July 12, 1996 and July 16, 1996 to a client identified as BC, which was not rendered by ROBERT T. MITRIONE, or not rendered to the extent billed;

All in violation of Title 18, United States Code, Sections 1341 and 2.

THE GRAND JURY FURTHER CHARGES:

Count 12

1. The Grand Jury realleges and reaffirms paragraphs 1 through 8 of Count 2 of this indictment as though fully set forth herein.

2. During a period of time from in or about May of 1996 and continuing through in or about March, 1997, at the direction of Robert T. Mitrione, a "support group" of "survivors of sexual abuse" was organized by one or more counselors in the office of Mitrione and Associates. Initially, this support group was handled by MARLA A. DEVORE as well as by another counselor who was attempting to qualify for a license to practice as a psychologist in the State of Illinois. Shortly after the support group was started, MARLA A. DEVORE stopped taking any active part in the group therapy sessions, but continued to oversee the billings.

3. During the period from at least in or about August; 1996 through at least in or about February, 1997, ROBERT T. MITRIONE and MARLA A. DEVORE directed an individual with no license, qualifications or education as a professional mental health counselor to co-lead this group, over the protest of the other counselor. On certain occasions during this time, MITRIONE and DEVORE directed the unqualified individual to "handle" the group on his own. During all of this time, members of the group, their insurance companies, the Medicare program and the Illinois Department of Public Aid were billed as if Robert T. Mitrione personally provided services to each member of this group.

4. On or about January 27, 1997, in the Central District of Illinois,

ROBERT T. MITRIONE and
MARLA A. DEVORE,

defendants herein, for the purpose of executing said scheme did knowingly cause to be delivered by the United States mail, according to the direction thereon, an envelope containing a warrant (check) and remittance advice mailed from the State of Illinois Office of the Comptroller and mailed to Mitrione, Robert T., 3021 Montvale, Suite D, Springfield, Illinois 62704 which was a Medicaid payment for one or more services claimed to have been rendered by ROBERT T. MITRIONE on November 14, 1996 to a client identified as LE, which was not rendered by ROBERT T. MITRIONE, and was, in fact rendered by one with no license, education or qualifications to render such service;

All in violation of Title 18, United States Code, Sections 1341 and 2.

THE GRAND JURY FURTHER CHARGES:

Count 13

1. The Grand Jury realleges and reaffirms paragraphs 1 through 8 of Count 2 of this indictment and paragraphs 1 through 3 of Count 12 as though fully set forth herein.

2. On or about April 3, 1997, in the Central District of Illinois,

ROBERT T. MITRIONE and
MARLA A. DEVORE,

defendants herein, for the purpose of executing said scheme did knowingly cause to be delivered by the United States mail, according to the direction thereon, an envelope containing a check and "Medicare Remittance Notice" mailed from the Health Care Service Corporation (HCSC), and mailed to Robert T. Mitrione, M.D., 3021 Montvale, Suite D, Springfield, Illinois 62704-4262 which was a Medicare payment for one or more services claimed to have been rendered by Robert T. Mitrione, M.D. on November 19, 1996 and December 4, 1996 to a client identified as PH, which services was not rendered by Robert T. Mitrione, M.D. or not rendered to the extent billed and were, in fact rendered by one with no license, education or qualifications to render such services;

All in violation of Title 18, United States Code, Sections 1341 and 2.

THE GRAND JURY FURTHER CHARGES:

Count 14

1. The Grand Jury realleges and reaffirms the allegations in paragraphs 1 through 8 of Count 2 of this indictment as though fully set forth herein.

2. On or about November 15, 1996, in the Central District of Illinois,

ROBERT T. MITRIONE and
MARLA A. DEVORE,

defendants herein, did present and cause to be presented to the Department of Health and Human Services, a Department of the United States of America, through the Illinois Department of Public Aid, a claim for services purportedly rendered by ROBERT T. MITRIONE, M.D. on or about November 14, 1996 to a client identified as BT, knowing said claim was at least partially false, fictitious and fraudulent when made;

In violation of Title 18, United States Code, Sections 287 and 2.

THE GRAND JURY FURTHER CHARGES:

Count 15

1. From at least on or about August 22, 1996 through on or about January 3, 1998, in the Central District of Illinois,

ROBERT T. MITRIONE and
MARLA A. DEVORE,

defendant herein, did knowingly and intentionally execute and attempt to execute a scheme and artifice to defraud one or more health care benefit programs and to obtain, by means of false and fraudulent pretenses, representations and promises the money or property owned by, and under the custody and control of one or more health care benefit programs, specifically the Medicaid and Medicare programs of the State of Illinois and the United States of America in connection with the delivery of or payment for health care benefits, items and services.

All in violation of Title 18, United States Code, Sections 1347 and 2.

/s/ Frances C. Hulin
Frances C. HULIN
United States Attorney

A True Bill.
/s/ [Illegible]
Foreperson

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

[Filed August 23, 2002]

No. 00-30021

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ROBERT MITRIONE AND MARLA DEVORE,
Defendants.

TRANSCRIPT OF PROCEEDINGS BEFORE
THE HONORABLE JEANNE E. SCOTT
U.S. DISTRICT JUDGE

---

* * * *

[4] versus Westmoreland, 240 F.3rd 618, 7th Circuit, 2001.

That case held that a new trial is warranted;

One, when the court is reasonably well-satisfied that the testimony given by a material witness was false.

Two, the jury might have reached a different conclusion absent the false testimony or if it had known that testimony by a material witness was false.

And three, the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it, or did not know of its falsity until after the trial.

The first inquiry is was there false testimony. The answer clearly is yes. For example, at the trial the Government's

summary witness, Ms. Statler, testified in response to Mr. Hansen's question as follows:

"Question; And did you look at whether a claim was filed?

"Answer; Definitely."

In the hearing on the motion for new trial, however, Ms. Statler testified that she was unaware that some of the allegedly undocumented claims included instances where a claim form had been placed in the patient's office file but the claim had not actually been submitted to Public Aid for payment. She testified in the hearing on the motion for new trial that she had not checked the Public Aid records [5] to verify which claims had actually been filed. She just had a printout of claims paid. The implication of her trial testimony is that she checked with Public Aid records to be sure that all of the 1,178 she said undocumented claims had been submitted for payment, and she had not.

At trial Ms. Statler further testified as follows:

"Question; And in making that spread sheet, 20A, did you do the best you could to eliminate any hospital codes or when there was any indication that there was some occurrence at the hospital?

"Answer; Right, if it was clearly a hospital record, we eliminated that."

Later on cross examination by Attorney Smith the following took place:

"Question; And you said that looking at the bills, claims that were submitted by Dr. Mitrione, you tried to eliminate any obvious hospital codes, is that right?

"Answer; Yes.

"Question; What would those codes be?

"Answer; Place of service code would be other than office. There's a place of service code on the bill."

Thereafter there was a discussion of service codes and then the following questions and answers:

"Question; But did you—were some of these codes eliminated by you because they were in the hospital?

[6] "Answer; No, we looked at place of service.

"Question; Okay. So on a claim form there's a place of service. And if it had hospital as place of service, you eliminated it? If it didn't, you kept it in there, is that right?

"Answer; That's right."

And later on redirect examination the following took place:

"Question; Looking at Defendant's Exhibit 2, does that appear to be a claim form for the IDPA?

"Answer; Yes, that's it.

"Question; And is there a place on this claim form that has the initials P.O.S.?

"Answer; Yes, that's it.

"Question; What is P.O.S.?

"Answer; Place of service.

"Question; And what does that mean?

"Answer; That's to indicate whether the place of service was at the doctor's office, at the hospital, or an outpatient, or a home, or anywhere else.

"Question; So for instance, if it was at a hospital, there would be a different number there than if it's at the office?

"Answer; Yes.

"Question; If it's at Libertase, an outpatient [7] facility, would it be something different than at the office?

"Answer; Yes.

"Question; And were you able to exclude all of those that had anything other than office codes?

"Answer; Yes.

"Question; Was that to get a picture of the number of billings for the office visits?

"Answer; Yes."

At the hearing on the motion for new trial Ms. Statler testified that they eliminated from the list of undocumented claims those that had an out of—excuse me, those that had an out of office place of service indicated as long as there was also documentation in the patient file reflecting that treatment had been given at the hospital. Her trial testimony lacked that qualification, although she was repeatedly asked about what steps had been taken to exclude claims for hospital visits. Her trial testimony was false. Her testimony that the 1,178 undocumented claims did not include claims for services rendered at a hospital was false to a dramatic degree.

Also at trial she testified that she personally had done the calculations for Government Exhibit 20A. She testified as follows;

"Question; Ma'am, in conducting the analysis to which [8] you've testified, did you manually count up each of the instances to make up these percentages?

"Answer; Yes, I did.

"Question; But you did not manually count up all of them, correct?

"Answer; I didn't count what?

"Question; You did not manually count up all of them, correct?

"Answer; Yes, we counted—I mean I counted all of them. I went through here and counted the number of instances."

At the hearing on the motion for new trial Ms. Statler testified that she did not do all of the counting for her analysis given at trial. She testified she had been assisted by Landers and Traylor in doing the counting. Her trial testimony in this case was false.

The next question is whether Ms. Statler was a material witness for the Government at trial.

In terms of refuting the defense to the charges based on ghost billing and upcoding at least, she was. The defense to these charges was that the Defendants were inept and ignorant of proper billing procedures and made many mistakes in billing, but that these mistakes were not intentionally made or made with the intent to defraud.

In support of that defense we heard testimony [9] primarily from Defendant DeVore of instances when a patient had seen Mitrione and another therapist, for example herself or Ms. Goff, in close proximity, and a bill was sent for Mitrione's rate when the service charge should have been for the lower rate of the other therapists, if billed at all.

She also testified to instances where services were rendered which would have qualified for reimbursement but no bill was sent.

Defense witness Parker presented a summary exhibit showing that with respect to the patients specifically referenced in the indictment, the ratio of instances where there had been a billing without service compared to the instances where there had been service noted without billing, was nearly 1 to 1.

Ms. Statler was the Government's witness who refuted that 1 to 1 ratio. She testified that for the period of time reflected in the charges in the indictment, based on a review of all

charges for services billed for which there was no documentation in the file, and services noted in the patient files for which charges could have been made but weren't, the charges without an accompanying service exceeded the instances where there were services but no charges by over 3 to 1. She testified to an actual differential of 28 percent to 9 percent. Even if the [10] obvious math error on Government Exhibit 20B is corrected, her testimony would still have indicated a differential of 2.64 to 1.

She was the only Government witness to refute the defense witness Parker as to the difference in claims without services recorded versus services recorded without claims. Therefore, she was a material witness on at least the ghost billing and upcoding charges contained in the allegations.

The next issue is might the jury have reached a different verdict without the testimony of witness Statler or if the jurors had known that the testimony of witness Statler was false?

It is, of course, impossible for the Court to know which bits of evidence the jury found the most persuasive in reaching its decisions. However, for purposes of this motion I am to look at the false testimony and determine whether the verdicts might have been different either without the trial testimony of Ms. Statler, or if the jury had known that part of Ms. Statler's testimony was false.

From a statistical analysis alone I have to conclude that at least as to the ghost billing and upcoding charges the verdicts might have been different.

Look at Exhibit 20A, for example, in light of Mr. Knobloch's testimony that was given at the hearing on the

* * * *

[17] took him two months to review it and come to his conclusions.

If means existed for the Defendants to know that the summary exhibit of the Government's was false, then the same means were also available to the Government. And the Government should have told us if it knew. I'm of the opinion that Mr. Hansen did not knowingly put false testimony on at trial. But the defense didn't discover the falsity of the evidence until after trial and they were unable realistically to meet it at trial, in part because of the witnesses' insistence that claims arising out of office were excluded. And that naturally misdirected defense counsels' cross examination. I find that the third prong of the test has been met.

The final question is what part or all of the charges were affected by the untruthful testimony. The evidence of we had as many claims that we could have legitimately made but didn't for services rendered as those we did for services not documented goes to the issue of Defendants' intent on at least the ghost billing charges. For those charges, the statistical testimony of Ms. Statler was relevant to the defense and adversely impacted it if the jury gave any weight to this defense, and I have to assume that it might for purposes of this motion.

For the counts of the indictment which included ghost [18] billing I find a new trial must be granted. I also find that Ms. Statler was a material witness on the charges related to substituted billing and upcoding and confusion of billing between Mitrione and Goff.

Counts 12 and 14 of the indictment listed as Counts 12 and 13 on the verdict form, however, are of a different category. These are charges arising from bills submitted to Medicaid for Dr. Mitrione when the services were provided by Walt Woods in leading the SOSA group, a group he wasn't professionally qualified to lead per Dr. Baer, or even co-lead with an intern per defense—excuse me, defense expert Bornstein. And they were for services at a time when the Defendants were either in Texas or had just returned home from Texas and were not in

the office and wouldn't have been available to intervene, because according to them they didn't know the particular session was even occurring. And Woods didn't know they were at home.

The bill in Count 12 related to patient L.E., who didn't get alcohol and drug counseling, even though that is, the only thing Woods was licensed to provide. The defense primarily was that Dr. Mitrione thought Woods was qualified because the group members had dependency issues. And Marla DeVore didn't want to co-lead the group, and he thought it would be better to have two. And there was a throw in [19] comment that he had told Woods not to see Medicaid patients even though he designated Woods to co-facilitate a group that had Medicaid patients in it.

Woods testified that in September of 1996, he had a discussion in the office with Marla DeVore. It was discussed that the group seemed to run better with him and the Defendants didn't see anything wrong with him running the group. Marla DeVore and Goff had run the group before, but Marla DeVore wanted out of it and didn't want to work with Goff.

Both Defendants knew Woods was leading or co-leading the group. Both reviewed the monthly reimbursements from Public Aid and the allocation to particular therapists. There was no evidence on these counts of the confusion of bill ing. There was no evidence on these counts to support a confusion in billing for one therapist when another provided the services here or a mistake on the date of billing with respect to these counts.

The issues raised by the summary exhibits and summary witnesses in my judgment did not go to those two counts. Count 14 dealt with individual and group therapy on November 13th and November 14th by Woods for patient B.T. when the Defendants were in Texas. But also was a patient without drug and alcohol problems. Again with respect to Count 14, I

find that summary witness's testimony unrelated [20] to the issues raised in Count 14.

Finally, the defense argued that a Brady violation occurred in that the Government suppressed evidence. I find, however, that the evidence was not suppressed. It was all there and presented to you. It was a sloppy, inaccurate analysis of the evidence by the Government witness. An incorrect, wrongful analysis, but there was no suppression of the evidence itself.

Therefore, after reviewing the charges in each count of the indictment and the evidence presented in each count, and giving the benefit of the doubt to the Defendants in any instance where a charge was based in whole or in part on evidence where the verdict might have been influenced by the false testimony, I allow the Defendant's joint motion for new trial based upon newly discovered evidence as to Defendant Mitrione on Counts 1, 2, 3, 4, 5, 6, 9, 10, 11, and 15. The Court further allows the motion for new trial as to Defendant DeVore on Counts 1, 3, 4, 5, 9, 10, 11, and 15 of the indictment. The convictions on the above counts are vacated.

The motion is further denied as-to both Defendants on Counts 12 and 14 of the indictment. I wish to note that Count 14 of the indictment in the verdict form was labelled as Count 13 for reasons discussed at the time. The convictions on Counts 12 and 14 of the indictment as to [21] each Defendant remain in effect.

The Court orders the Government to advise the Court and opposing counsel by September 3rd, 2002, whether it will re-try the Defendants on the charges in the counts for which the motion for new trial has been allowed. If the Government elects to re-try these counts, the Court orders the parties to file any additional pre-trial motions limited to matters affected by the ruling on the motion for new trial by October 1, 2002. The Court deems that all other pre-trial motions previously filed and ruled upon have again been filed, so that those issues are

preserved, and the Court adopts its prior rulings with respect to it.

Jury trial will be set for January 13th, 2003 at 9 a.m. A final pre-trial conference will be held on December 13th, 2002 at 3:30 p.m. If the Government elects not to re-try the Defendants on the charges and the counts for which the motion for new trial has been allowed, then the Probation Department is ordered to file a second revised Pre-Sentence Report by September 20th, 2002, addressing any matters which need to be revised as a result of the Court's ruling this date. A sentencing hearing will in that event be held at 1:30 p.m. on October 2—excuse me, October 31st, 2002.

I have prepared a minute entry with those dates and directions, which the Clerk has and will make available to [22] you today.

That is my ruling. That is all I have for you. We're in recess.

(Court recessed.)

I, KATHY J. SULLIVAN, CSR, RPR, Official Court Reporter, certify that. the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Kathy J. Sullivan
KATHY J. SULLIVAN
License # 084-002768

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 02-4222 & 02-4224

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT T. MITRIONE and MARLA A. DEVORE,
Defendants-Appellants.

March 25, 2004, Decided

ORDER

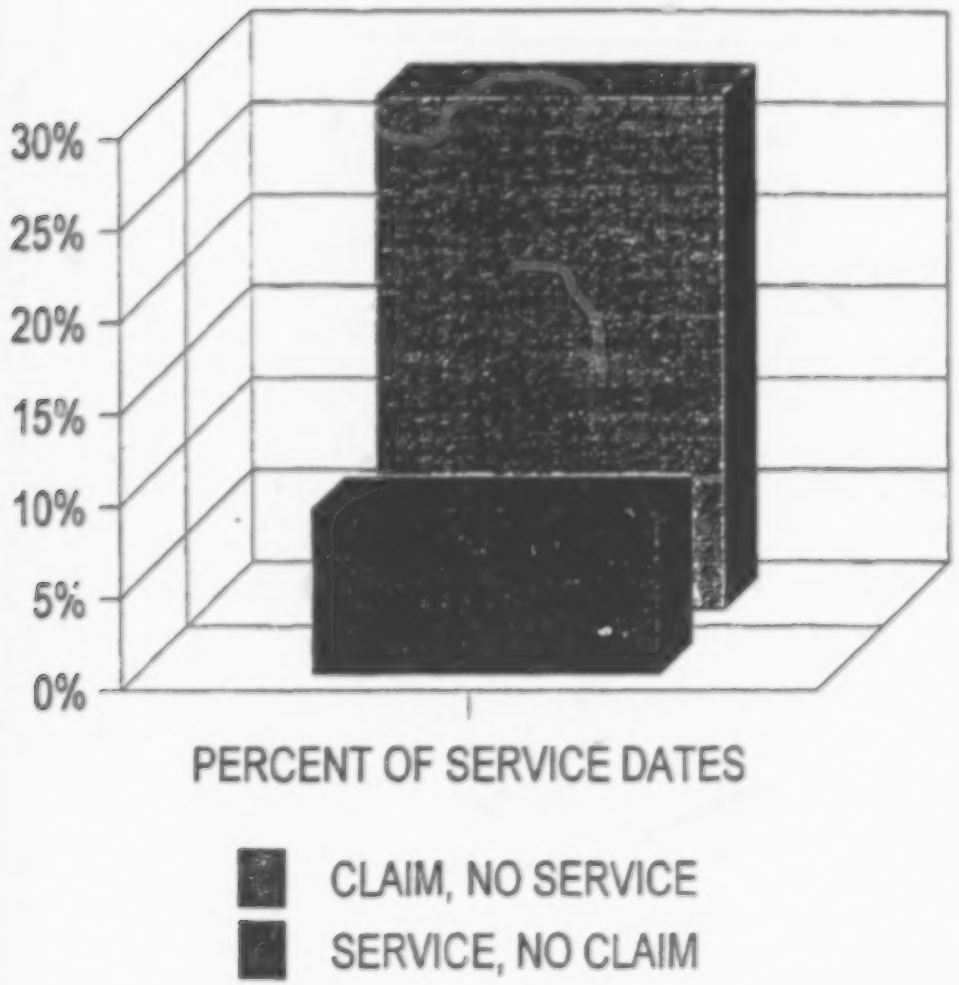
On February 23, 2004, the defendants-appellants filed a petition for rehearing. All the judges on the original panel havevoted to deny a rehearing. The petition is therefore DENIED.

MITRIONE AND ASSOCIATES

MEDICAID FILES REVIEWED FROM 10/1/94-1/03/98

1. NOTE OR INDICATION OF SERVICE IN FILE, NO CLAIM. 446/4073= 9%

2. NO NOTE OR INDICATION OF SERVICE, CLAIM SUBMITTED 1178/4073=28%



No. 05-657

In the Supreme Court of the United States

ROBERT T. MITRIONE AND MARLA A. DEVORE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
LOUIS M. FISCHER
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Department of Justice
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QUESTIONS PRESENTED

Petitioners were found guilty by a jury on multiple criminal charges involving Medicaid and Medicare fraud. Based on newly discovered evidence that a prosecution witness had committed perjury at trial, the district court granted petitioners' subsequent motion for a new trial on most of the counts. The court denied the new trial motion, however, with respect to two of the counts, on the ground that the perjured testimony was unrelated to those charges. The questions presented are as follows:

1. Whether the district court erred in denying petitioners' motion for a new trial with respect to two of the counts of conviction.

2. Whether petitioners' convictions on mail fraud and false claim charges should be reversed because those counts incorporated by reference allegations concerning the scheme to defraud that were contained in counts of the indictment as to which the district court granted petitioners' motion for a new trial.

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In the Supreme Court of the United States

No. 05-657

ROBERT T. MITRIONE AND MARLA A. DEVORE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is unreported. The opinion of the district court (Pet. App. 2a-9a) is unreported. A prior opinion of the court of appeals affirming petitioners' convictions (Pet. App. 13a-29a) is reported at 357 F.3d 712. A prior opinion of the district court denying a motion for partial dismissal of the indictment (Pet. App. 30a-34a) is reported at 160 F. Supp. 2d 993.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 2005. The petition for a writ of certiorari was filed on November 22, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Central District of Illinois, petitioners were convicted of conspiring to defraud the United States, in violation of 18 U.S.C. 371 (Count 1); mail fraud, in violation of 18 U.S.C. 1341 (Mitrione: Counts 2, 3, 5, 10-12; DeVore: Counts 3, 5, 10-12); filing false claims, in violation of 18 U.S.C. 287 (Mitrione: Counts 4, 6, 9 and 14; DeVore: Counts 4, 9, and 14); and health care fraud, in violation of 18 U.S.C. 1347 (Count 15). See Pet. App. 35a-51a (indictment); Gov't C.A. Br. 2-3.[1] Petitioners subsequently filed a motion for new trial based on newly discovered evidence. Pet. App. 14a. The district court denied the motion as to Counts 12 and 14, but granted it as to the remaining counts. See *id.* at 52a-61a.

The government elected not to retry petitioners on the charges on which a new trial had been granted. With respect to Counts 12 and 14, petitioner Mitrione was sentenced to 23 months of imprisonment, to be followed by three years of supervised release. See Gov't C.A. Br. 3. Petitioner DeVore was sentenced to 15 months of imprisonment, to be followed by three years of supervised release. *Ibid.* Each petitioner was also ordered to pay restitution in the amount of $11,255.65. *Ibid.* The court of appeals affirmed. Pet. App. 13a-29a.

Petitioners then filed a petition for a writ of certiorari (No. 03-1668) seeking review of the court of appeals' decision. This Court granted the petition, vacated the judgment of the court of appeals, and remanded the case

---

[1] Petitioner Mitrione was acquitted on one count of mail fraud and one count of filing false claims. Petitioner DeVore was acquitted on two counts of mail fraud and two counts of filing false claims. The government dismissed one mail fraud count. Pet. App. 3a.

for further consideration in light of *United States* v. *Booker*, 125 S. Ct. 738 (2005). *Mitrione* v. *United States*, 125 S. Ct. 984 (2005) (Pet. App. 12a). The court of appeals in turn remanded the case to the district court, which imposed the same sentences that it had originally imposed. Pet. App. 2a-9a. The court of appeals affirmed. *Id.* at 1a.

1. Mitrione, a psychiatrist, and DeVore, his office manager, were indicted on charges of fraud in connection with their receipt of payments under the Medicaid and Medicare programs. The fraud involved billing for services that were not provided (ghost billing), overstating services that were provided (upcoding), and billing for services performed by others while declaring that the services were provided by Mitrione personally (substitute billing). Pet. App. 13a.

In the early 1990s, Mitrione established a psychiatric practice in Springfield, Illinois. The following year, he sought to become a Medicaid provider by filing an application with the Illinois Department of Public Aid (IDPA), which administers the Medicaid program in Illinois. Mitrione agreed to comply with Illinois Medicaid policies set forth in the applicable medical assistance handbooks. One such policy was that physicians could be paid under Illinois Medicaid only for psychiatric services personally provided by the physician and that services rendered by a psychologist or social worker were not reimbursable. Pet. App. 14a-15a.

Mitrione was also enrolled as a provider with the Medicare Part B system, which (like Medicaid) is a "fee for service" program. Unlike Illinois Medicaid, Medicare allows providers under certain circumstances to obtain reimbursement for psychological services that are performed by delegees rather than by the physician

personally. Medicare regulations require, *inter alia*, that those services be performed under the direct supervision of the physician. The Medicare manual states that, in order to satisfy the "direct supervision" requirement, a physician must be present in the same office so that he can intervene if an emergency arises. Even if a physician is present, the Medicare rules do not allow payment for the services of unlicensed mental health providers. Pet. App. 15a.

In September 1994, Mitrione brought DeVore into his practice as a new officer manager. Petitioners instituted a policy of billing IDPA for services performed by nonphysicians, while causing their billing clerks to substitute Mitrione's name for that of a nonphysician on the claim forms sent to IDPA. DeVore reviewed the claims before they were sent to Medicare, IDPA, or various insurance companies. Pet. App. 16a.

In 1995, Mitrione hired nonphysicians to provide counseling services to his practice's clients. Mitrione provided medication management, and he referred the patients to the counselors for individual psychotherapy. Medicaid and Medicare paid less for medication management sessions than for more time-consuming psychotherapy sessions. Mitrione and DeVore repeatedly billed Medicare for lengthy psychotherapy sessions when only medication management services were actually provided. That conduct formed the basis for the "upcoding" charges in the indictment. See Pet. App. 17a; Gov't C.A. Br. 13.

Mitrione hired Terry Goff, an unlicensed intern working on his advanced psychology degree, and Walter Woods, a drug and alcohol counselor. Although neither Woods nor Goff was licensed to provide mental health services, both were assigned to counsel Medicaid pa-

tients. Petitioners billed for the services provided by Woods and Goff as though Mitrione had either provided or directly supervised those services. That conduct formed the basis for the substitute billing charges in Counts 12 and 14 of the indictment. Pet. App. 17a-18a.

Petitioners also submitted claims to IDPA and Medicare for services that were not rendered at all—conduct that formed the basis for the "ghost billing" charges. DeVore instructed Goff to document telephone sessions with clients (which were not reimbursable by IDPA and Medicare) as if they were face-to-face sessions, and then bill for those sessions. IDPA and Medicare also refused to pay for missed or cancelled appointments; DeVore billed for sessions when the records established that the session did not occur. Additionally, IDPA would not pay for two services on a single date. When clients saw both DeVore for counseling and Mitrione for medication management on the same date, DeVore instructed her billing clerks to bill as if the client had been seen by Mitrione on two different dates. Gov't C.A. Br. 14-15.

2. Before trial, petitioners moved for a partial dismissal of the indictment. They argued that all references to substitute billing as a fraudulent billing scheme should be struck from the indictment because substitute billing did not violate state or federal law. Pet. App. 30a. Petitioners contended that a provision of IDPA's *Medical Assistance Program Handbook* cited in Count 2 of the indictment (see Pet. App. 41a), which stated that reimbursement for psychiatric services is available under Illinois Medicaid rules only for services personally provided by the physician who submits the bill, did not have the force of law.

The district court denied the motion to dismiss. Pet. App. 30a-34a. The court agreed with petitioners that the handbook is an interpretive document and does not have the force of law. *Id.* at 31a. The court determined, however, that the relevant handbook provision reflected a correct interpretation of the Illinois Administrative Code, which is legally binding. *Id.* at 31a-32a. Based on its analysis of the pertinent Illinois Administrative Code provisions, the court concluded that, "[f]or Medicaid reimbursement for psychiatric services, Illinois requires that the services actually be provided by the physician and not by members of his staff under his direct supervision." *Id.* at 32a.

3. The jury found petitioners guilty on the majority of the charges contained in the indictment, including the substitute billing charges set forth in Counts 12 and 14. Petitioners subsequently filed a motion for a new trial, based on newly discovered evidence that Deanna Statler, an IDPA auditor who had testified as a rebuttal witness for the government, had committed perjury at trial. See Pet. App. 13a-14a, 20a.

The district court granted the new trial motion with respect to all counts of conviction except for Counts 12 and 14. See Pet. App. 21a, 52a-61a. After concluding that Statler had given false testimony, the district court turned to the question "whether Ms. Statler was a material witness for the Government at trial." *Id.* at 56a. The court held that Statler was a material witness with respect to the ghost billing and upcoding charges. The court explained that "[t]he defense to these charges was that [petitioners] were inept and ignorant of proper billing procedures and made many mistakes in billing, but that these mistakes were not intentionally made or made with the intent to defraud." *Ibid.* The court found that

Statler's rebuttal testimony was a significant part of the government's efforts to refute that defense. *Id.* at 56a-57a. The court concluded that "as to the ghost billing and upcoding charges the verdicts might have been different" if Statler had not testified or if the jurors had known that her testimony was false, *id.* at 57a, and on that basis it granted the motion for a new trial on those charges, *id.* at 58a. The district court denied the motion for a new trial with respect to Counts 12 and 14, however, finding that Statler's testimony "did not go to those two counts." *Id.* at 59a; see *id.* at 52a-53a, 58a-60a.

4. The government declined to retry petitioners on the counts as to which the district court had granted the motion for a new trial. Petitioners appealed their convictions and sentences on Counts 12 and 14 of the indictment. The court of appeals affirmed. Pet. App. 13a-29a.

a. The court of appeals first observed that, in determining whether post-trial evidence of perjury by a government witness entitles a criminal defendant to a new trial, the Seventh Circuit has traditionally used the test it adopted in *Larrison* v. *United States*, 24 F.2d 82 (1928). Pet. App. 21a. Under the *Larrison* test, a new trial is granted in such cases if, without the false testimony, "the jury *might* have reached a different conclusion." *Larrison*, 24 F.2d at 87; see Pet. App. 21a. The court of appeals explained that the *Larrison* test "puts [the Seventh Circuit] at odds with other circuits which, absent a finding that the government knowingly sponsored the false testimony, require a defendant seeking a new trial to show that the jury would *probably* have reached a different verdict had the perjury not occurred." *Ibid.* (citing cases). The court overruled its prior decision in *Larrison* and adopted the reasonable